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Supreme Court, U.S.
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In The

Supreme Court of the United States

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KEVIN WEDDERBURN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

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On Petition For a Writ of Certiorari to The
United States Court of Appeals for
the Seventh Circuit

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# PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does 8 U.S.C. § 1432, which conditions citizenship for the child of a naturalized citizen upon the parent's gender, the child's illegitimacy, and the parent's marital status, violate the Equal Protection guarantee of the Fifth Amendment?

## LIST OF PARTIES

The parties to the proceedings below were the Petitioner, Kevin Wedderburn, and the Respondent, the Immigration and Naturalization Service.

# TABLE OF CONTENTS

*Page*

QUESTION PRESENTED ..... i

LIST OF PARTIES ..... ii

TABLE OF AUTHORITIES ..... v

OPINIONS BELOW ..... 1

STATEMENT OF JURISDICTION ..... 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED ..... 2

STATEMENT OF THE CASE ..... 3

A. Factual Background ..... 3

B. Proceedings Below ..... 4

REASONS FOR GRANTING THE WRIT ..... 8

I. THIS CASE RAISES IMPORTANT QUESTIONS THAT ARE CURRENTLY PENDING BEFORE THE COURT IN ANOTHER CASE ..... 9

A. Gender Discrimination in Citizenship Statutes ..... 9

B. Standing ..... 12

II. THIS CASE ALSO RAISES AN IMPORTANT QUESTION OF WHETHER CITIZENSHIP MAY BE CONDITIONED ON A CHILD'S LEGITIMACY OR THE MARRIAGE OF HIS PARENTS ..... 14

A. Section 1432(a)(3)'s Legitimacy-Related Distinctions and the Proper Standard of Review ..... 14

B. Widespread Changes In The Law of Legitimation ..... 17

III. A REMEDY FOR THE STATUTE'S INVALIDITY IS AVAILABLE ..... 18

CONCLUSION ..... 21

## TABLE OF AUTHORITIES

*Page*

*Breyer v. Meissner*, 214 F.3d 416 (3d Cir. 2000) ..... 11

*Califano v. Westcott*, 443 U.S. 76 (1979) ..... 19

*Clark v. Jeter*, 486 U.S. 456 (1988) ..... 14, 16

*Fiallo v. Bell*, 430 U.S. 787 (1977) ..... 11

*Johnson v. Robison*, 415 U.S. 361 (1974) ..... 5

*Kennedy v. Mendoza-Martinez*,
372 U.S. 144 (1963) ..... 9

*Lake v. Reno*, 226 F.3d 141 (2nd Cir. 2000) ..... 9, 11

*Levy v. Louisiana*, 391 U.S. 68 (1968) ..... 16

*Matter of Rivers*, 17 I. & N. Dec. 419 (BIA 1980) ..... 19

*Miller v. Albright*, 523 U.S. 420 (1998) ..... passim

*Mississippi University for Women v. Hogan*,
458 U.S. 718 (1982) ..... 15

*Nguyen v. Immigration and Naturalization Service*,
208 F.3d 528 (5th Cir. 2000), *petition for cert granted*,
__*U.S.*__, 69 U.S.L.W. 3191 (Sept. 26, 2000) . passim

*Powers v. Ohio*, 499 U.S. 400 (1991) ..... 12, 13

*Terrell v. Immigration & Naturalization Service*,
157 F.3d 806 (10th Cir. 1998) . . . . . 9

*Trimble v. Gordon*, 430 U.S. 762 (1977) . . . . . 7, 16, 17

*United States v. Ahumada-Aguilar*, 189 F.3d 1121
(9th Cir. 1999), *petition for cert. filed*,
__U.S.__, 68 U.S.L.W. 3741 (May 22, 2000) . . 9, 11

*Wedderburn v. Immigration and Naturalization Service*,
215 F.3d 795 (7th Cir. 2000) . . . . . passim

*Welsh v. United States*, 398 U.S. 333 (1970) . . . . . 19

## STATUTES AND REGULATIONS

U.S. Const. amend. V ..... 2

Child Citizenship Act, Pub. L. No. 106-395; 114 Stat. 1631 (October 30, 2000)(to be codified at 8. U.S.C. § 1431) ..... 19, 20

8 U.S.C. § 1101(c) ..... 15, 17

8 U.S.C. § 1103 ..... 5

8 U.S.C. § 1401 ..... 10

8 U.S.C. § 1409 ..... 9, 10, 11, 12, 13

8 U.S.C. § 1432 ..... passim

8 U.S.C. § 1433 ..... 7

28 U.S.C. § 1254(1) ..... 2

8 C.F.R. § 240.1(a) ..... 5

8 C.F.R. § 341.6 ..... 5

8 C.F.R. § 103.3(a) ..... 5

## MISCELLANEOUS

C. Gordon, S. Mailman & S. Yale-Loehr, *Immigration Law & Procedure*, § 98.03(2) (1999) ..... 20

N. Johnson, *Recent Developments: The Breadth of Family Law Review Under the European Convention on Human Rights*, 36 HARV. INT'L L.J. 513 (1995) .. 17

Comment, *The Effects of Intercountry Adoptions on Biological Parents' Rights*, 22 LOYOLA L.A. INT'L & COMP. L.REV. 251 (1999) ..... 17

No._____

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KEVIN WEDDERBURN,

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IMMIGRATION AND NATURALIZATION SERVICE,

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On Petition For a Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

# PETITION FOR A WRIT OF CERTIORARI

Petitioner Kevin Wedderburn respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

## OPINIONS BELOW

The opinion of the court of appeals (App. 2a - 14a)is reported at 215 F.3d 795 (7th Cir. 2000). The opinion of the Board of Immigration Appeals (App. 15a-20a) is unreported. The deportation order of the Immigration Judge (App. 21a) is unreported.

Two other relevant decisions were made in this case by the Immigration and Naturalization Service ("INS"). The INS' initial decision denying Kevin Wedderburn's application for a Certificate of Citizenship is found at App. 27a-30a. The decision of the INS' Administrative Appeals Unit, affirming this decision, is found at App. 22a-26a.

## STATEMENT OF JURISDICTION

The decision and judgment of the court of appeals was issued on June 1, 2000. The decision denying the petition for rehearing and suggestion for rehearing en banc was issued on August 31, 2000. (App. 1a.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides in pertinent part:

No person shall be * * * deprived of life, liberty, or property, without due process of law.

2. 8 U.S.C. § 1432, Section 321 of the Immigration and Nationality Act (INA), Sec. 14, Act of Nov. 14, 1986, provides, in pertinent part:

(a) A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while such child is under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this section, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

## STATEMENT OF THE CASE

### A. Factual Background

Kevin Wedderburn was born in Jamaica on October 30, 1975, the son of Fitzroy Wedderburn and Julie Hines. *Wedderburn v. Immigration and Naturalization Service*, 215 F.3d 795, 797 (7th Cir. 2000) (App. 3a). At the time of Kevin's birth, Julie Hines and Fitzroy Wedderburn were citizens and nationals of Jamaica. *Id.* They were not married when Kevin was born, nor did they ever marry. *Id.* Kevin never lived with his mother; he was raised by his maternal grandmother until he was eleven years old. *Id.* at 798 (App. 5a - 6a).

After Kevin's birth, Fitzroy Wedderburn came to the United States and later married Velma Hyacinth Wedderburn. *Id.* at 797 (App. 3a). On the basis of that marriage, Fitzroy and

Velma Wedderburn began the process of bringing Kevin to the United States as a lawful permanent resident. *Id.* Julie Hines was aware of their efforts. (App. 31a.) In 1982, when Kevin was seven years old, she notified the INS in New York -- Fitzroy's residence -- that Fitzroy Wedderburn was Kevin's father and that she intended to relinquish custody of Kevin to his father and stepmother in the United States. *Id.*

Fitzroy Wedderburn legitimated his son under the laws of Jamaica when Kevin was ten years old. *Id.* On October 9, 1987, at the age of eleven, Kevin was admitted into the United States as a lawful permanent resident based upon the immediate relative petition filed on his behalf by his stepmother and his father. *Id.* (App. 3a - 4a). Kevin joined Fitzroy and Velma Wedderburn in New York, and lived with them there. *Id.* Some years later, Fitzroy and Velma allowed Kevin to go Illinois to live with his paternal grandmother. *Id.*

On June 2, 1993, when Kevin was seventeen years old, Fitzroy Wedderburn became a naturalized citizen of the United States. *Id.* at 796 (App. 3a).

In 1995, Kevin was convicted of aggravated criminal sexual assault, and sentenced to a term of six years' imprisonment. *Id.* After Kevin completed his sentence, he was immediately taken into the custody of the INS and has remained in INS custody since that time. (App. 32a-33a.)

### B. Proceedings Below

The INS commenced deportation proceedings against Kevin while he was still incarcerated. (App. 17a.) Kevin defended on the ground that he was not an alien, because he had become a United States citizen automatically on June 2, 1993, the day his father naturalized. *Id.*

Kevin made this claim under 8 U.S.C. § 1432. Section 1432 confers automatic citizenship upon minor children of naturalized United States citizens, if the naturalization occurs before the child turns eighteen and while the child is a legal resident of the United States. (App. 17a-18a.) Because an immigration judge cannot adjudicate a claim of automatic citizenship under 8 U.S.C. § 1432 (*see* 8 C.F.R. § 240.1(a)), the immigration judge held Kevin's deportation proceedings in abeyance so Kevin could file an application for a Certificate of Citizenship based on his claim that under 8 U.S.C. § 1432, he derived citizenship through his father in 1993. (App. 17a-18a.) If the INS recognized Kevin's automatic citizenship claim through his father, the deportation proceedings would be terminated as Kevin would not be an alien and could not be deported.

On March 3, 1998, the INS issued a written decision denying Kevin's claim to automatic citizenship. (App. 22a.) The INS denied the application because "[§ 1432] only allows for the acquisition of U.S. citizenship through the mother for children born out of wedlock." (App. 30a-31a.)

Kevin Wedderburn appealed that decision to the INS Office of Administrative Appeals in Washington, D.C. (App. 23a.) On August 13, 1998, the INS dismissed his appeal. *Id.* There is no further appeal from that decision. *See* 8 C.F.R. §§ 341.6 and 103.3(a). Neither the INS nor the Office of Administrative Appeals could address Kevin's constitutional claims. *See* 8 U.S.C. § 1103; *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (administrative agencies lack jurisdiction to adjudicate the constitutionality of congressional enactments).

On August 19, 1998, the immigration judge ordered Kevin deported to Jamaica. (App. 22a.) Kevin appealed to the Board of Immigration Appeals ("BIA"), which dismissed Kevin's appeal on April 19, 1999. (App. 16a-21a.)

Kevin filed a petition for review of the BIA order in the United States Court of Appeals for the Seventh Circuit, claiming that he was a citizen under § 1432. Kevin met the requirements of § 1432(a)(4) and (a)(5) because he was under eighteen years of age and a lawful permanent resident of this country at the time of his father's naturalization. *Wedderburn*, 215 F.3d at 797 (App. 4a.) Subsections (a)(1) through (a)(3) lay out the circumstances under which naturalized parents can pass citizenship to their children. Generally speaking, these subsections envision that if both parents are present in the child's life, both must naturalize, but if one parent is out of the picture, then the naturalization of the remaining parent is sufficient.

Kevin contended that under subsection (a)(3) he became a citizen when his father naturalized, because his mother was indeed out of the picture and unavailable, and his father, who had legitimated Kevin and brought him to the United States, was his custodial parent. Thus, his father was the functional equivalent of a mother of an illegitimate child, whom § 1432(a)(3) allows to confer citizenship upon her child single-handedly. Kevin also contended that the subsection's requirement that parents be "legally separated" in order to transmit citizenship single-handedly should be read broadly to permit derivative citizenship where the parents had never married and the child was in the sole legal custody of the naturalizing parent. This reading is supported by the legislative history, which suggests that the legal separation requirement is an unintentional holdover from the days when a child could only be legitimated through the marriage of his parents; and by the statute's purpose, which the INS identified as the preservation of family unity and the avoidance of harsh results. Finally, Kevin argued that if the statute is given a purely literal reading, it discriminates unconstitutionally on the basis of gender and illegitimacy.

On June 1, 2000, the court of appeals dismissed Kevin's petition, including both his statutory and constitutional claims. The court held that Kevin was not a citizen under 8 U.S.C. § 1432 because Kevin's father was not -- and could never be -- "legally separated" from Kevin's mother. *Wedderburn*, 215 F.3d at 799 (App. 8a - 9a). The court did not address the fact that legitimation by means other than marriage has become increasingly common in the years since the statute was enacted, or the fact that, as a result, large numbers of legitimated children live in families with a single parent or (as here) a single parent and a step-parent. The court instead hypothesized that these families constituted only a "small subset" of naturalizing families, and so excluding them from the benefits of passing citizenship from parent to child was *de minimis*. *Id.* at 800 (App. 10a). In reaching this result, the court relied heavily on a parent's ability to obtain citizenship for his child "as a matter of right" under § 322, another provision of the Immigration and Nationality Act ("INA") (codified at 8 U.S.C. § 1433).[1] *Id.* at 800 (App. 10a).

Turning to Kevin's constitutional claims, the court held that § 1432 does not discriminate on the basis of gender despite its express language favoring the mothers of children born out of wedlock over the fathers of such children. The court first held that under *Miller v. Albright*, 523 U.S. 420 (1998), Kevin did not have standing to claim that § 1432(a)(3) discriminated against his father on the basis of gender.

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[1] The court's reliance on Fitzroy Wedderburn's ability to file a petition under 8 U.S.C. § 1433 is misplaced for two reasons: the grant of such a petition is discretionary, not "a matter of right," as the court described it; and the availability of less favorable alternate routes to citizenship is irrelevant to the issue of whether the distinctions drawn in § 1432 are unconstitutional. *See, e.g., Trimble v. Gordon*, 430 U.S. 762, 774 (1977) ("Hard cases cannot be avoided by a hypothetical reshuffling of the facts.").

*Wedderburn,* 215 F.3d at 801-02 (App. 11a - 12a). Even if Kevin could raise this claim, however, the court rejected it on the ground that Kevin's father was not similarly situated to the mother of an illegitimate child, because he had legitimated Kevin. *Id.* at 802 (App. 13a). Finally, the court noted that § 1432 discriminates in favor of illegitimate children, but applied no scrutiny to that distinction. *Id.* The court denied Kevin's petition for rehearing and suggestion for rehearing en banc on August 31, 2000. (App. 1a).

## REASONS FOR GRANTING THE WRIT

The United States Court of Appeals for the Seventh Circuit has held that 8 U.S.C. § 1432 does not discriminate unconstitutionally in conditioning citizenship for the child of a naturalized citizen upon the parent's gender, the child's illegitimacy, and the parent's marital status. These holdings conflict with the prior decisions of this Court, including *Miller v. Albright,* 523 U.S. 420 (1998), in which a majority of the Court applied heightened scrutiny to gender-based distinctions in 8 U.S.C. § 1409. That provision confers citizenship on out-of-wedlock children who have one native-born citizen parent. Section 1432, which similarly confers citizenship on the children of naturalized citizen parents, contains gender-based distinctions even harsher than those in § 1409, as well as legitimacy-based distinctions. It therefore is subject to the same analysis as § 1409. The Court's grant of certiorari in *Nguyen v. Immigration and Naturalization Service,* 208 F.3d 528 (5th Cir. 2000), *cert. granted,* 69 U.S.L.W. 3191 (Sept. 26, 2000), to address again the validity of § 1409, presents a timely opportunity for the Court to address the same issues in the context of § 1432, a parallel provision.

## I. THIS CASE RAISES IMPORTANT QUESTIONS THAT ARE CURRENTLY PENDING BEFORE THE COURT IN ANOTHER CASE

### A. Gender Discrimination in Citizenship Statutes

In *Miller v. Albright*, 523 U.S. 420 (1998), this Court reviewed the constitutionality of 8 U.S.C. § 1409, the provision governing the ability of native-born fathers to transmit citizenship to their children born out of wedlock. The plaintiff, Lorelyn Miller, challenged the validity of the statute's requirement that a citizen father of a child born out of wedlock abroad must establish his paternity of the child through a formal act prior to the child's 21st birthday, while citizen mothers of such children face no such requirement. The case was decided by a plurality and drew five separate opinions. In the short time since *Miller* was decided, courts have struggled with its proper application.[2]

*Miller* involves the overlap of two fundamental areas: the sharing of United States citizenship between a parent and his child, and the equal application of the law regardless of gender or other suspect classifications. Citizenship is "a most precious right," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159 (1963), that is valued especially highly by those like Fitzroy Wedderburn who have left their homes, worked hard, and waited long in order to attain it. No less important is the principle of equal protection under the law, a basic tenet of American society for more than a century. How these

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[2] *See, e.g., Lake v. Reno*, 226 F.3d 160 (2d Cir. 2000); *Nguyen v. Immigration and Naturalization Service*, 208 F.3d 528 (5th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3191 (Sept. 26, 2000); *United States v. Ahumada-Aguilar*, 189 F.3d 1121 (9th Cir. 1999); *petition for cert. filed*, 68 U.S.L.W. 3741 (May 22, 2000); *Terrell v. Immigration and Naturalization Service*, 157 F.3d 806 (10th Cir. 1998).

principles interact, in the context of the decades-old naturalization provisions of our immigration law, is a difficult issue that touches the lives of thousands of families each year. Affirming the continuing importance of this issue, the Court recently granted certiorari in *Nguyen v. Immigration and Naturalization Service*, 208 F.3d 528 (5th Cir. 2000), *cert. granted*, 69 U.S.L.W. 3191 (Sept. 26, 2000), to address once again the constitutionality of § 1409.

Like § 1409, § 1432 is a provision of the Immigration and Nationality Act that governs the automatic transmission of citizenship between a citizen parent and his child. Section 1409 sets out the conditions under which a native-born citizen parent can pass citizenship to his child born out of wedlock, while § 1432 governs the ability of naturalized citizen parents to do the same. Like § 1409, § 1432 contains gender distinctions, treating fathers of children born out of wedlock differently from mothers simply on the basis of gender. In § 1409, these distinctions take the form of a requirement that a father recognize his paternity of the child during the child's minority in order to share his citizenship with his child, while a mother may share her citizenship without meeting any such requirement. *See* 8 U.S.C. § 1409(a); *cf.* 8 U.S.C. § 1401. In § 1432, the gender distinctions are contained in subsection (a)(3), which permits unwed mothers of children born out of wedlock to transmit citizenship to their children so long as the children have not been legitimated, but denies unwed fathers the right to transmit citizenship to their children under any circumstances, even if they have legitimated their children and assumed full responsibility for them.

The arguments raised in *Nguyen* and *Miller* that § 1409 unconstitutionally discriminates on the basis of gender -- arguments supported by a majority of the Court in *Miller*, *see* 523 U.S. at 476 (Breyer, J., dissenting) -- apply to § 1432 with even greater force. In § 1409, there is at least some mechanism by which an unwed citizen father can demonstrate his

connection to his child and thereby pass on his own citizenship, through legitimation, written acknowledgment, or a court adjudication of paternity before the child reaches eighteen years of age. By contrast, § 1432(a)(3) makes no provision at all for an unwed, naturalized father to transmit citizenship to his child, even if he acknowledges paternity, legally legitimates the child, and financially supports the child during the child's minority. Kevin Wedderburn's father did all these things, yet under the literal language of § 1432 Kevin still can never acquire citizenship through his father. Under § 1432(a)(3) as written, transmittal of citizenship from an unwed citizen father to his legitimated son or daughter is impossible in all circumstances. The analysis applied to the gender distinctions in § 1409 is applicable here.

In addition, this case, like *Nguyen*, raises the question of whether statutes conditioning citizenship on gender distinctions should be subjected to heightened scrutiny. A majority of the Court suggested in *Miller* that heightened scrutiny was appropriate, despite the deferential review this Court has sometimes accorded immigration and naturalization statutes. *See* 523 U.S. at 434 n.11 (plurality), 472 (Breyer, J., dissenting). No member of the Court voted to apply the more relaxed review of *Fiallo v. Bell,* 430 U.S. 787 (1977), and both Justice Stevens and Justice Breyer explicitly held that the *Fiallo* standard is inapplicable to claims of automatic citizenship for the children of United States citizens. *See* 523 U.S. at 429 (plurality), 477-78 (Breyer, J., dissenting). The courts of appeals facing the issue since then have generally applied heightened scrutiny. *See Lake v. Reno,* 226 F.3d 141, 148 (2d Cir. 2000); *Nguyen,* 208 F.3d at 534-35; *United States v. Ahumada-Aguilar,* 189 F.3d 1121, 1126 (9th Cir. 1999); *see also Breyer v. Meissner,* 214 F.3d 416, 424 (3d Cir. 2000) (applying heightened scrutiny to plaintiff's claim that a statute discriminated against his citizen mother in her ability to pass her citizenship to him). Nevertheless, the question of the correct standard of review for citizenship-conferring statutes

that discriminate based on gender is not free from doubt. Once again, the Court's answer in *Nguyen* to these questions will guide the resolution of this case as well.

B. Standing

In *Miller*, the Court was divided over whether the plaintiff child had standing to challenge the gender discrimination in § 1409, because the person most directly affected by that discrimination was her father, not the plaintiff herself. Justice O'Connor, joined by Justice Kennedy, voted to reject the plaintiff's claim on the ground that she lacked standing to raise it under the test for third-party standing set out in *Powers v. Ohio*, 499 U.S. 400, 411 (1991).[3] The remaining Justices, however, all found that Lorelyn Miller has standing to raise the gender discrimination claim. Justices Stevens and Rehnquist held that the plaintiff child's own claim was so intertwined with her father's claim that they should be considered together. 523 U.S. at 433. Justice Scalia, joined by Justice Thomas, stated that he, too, accepted petitioner's standing to bring this claim. 523 U.S. at 455 n.1 (Scalia, J., concurring). Finally, Justice Breyer, joined by Justices

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[3] In its response to the petition for certiorari in *Nguyen*, the government made much of the fact that *Nguyen* presented no standing issue because both the child and the father were plaintiffs. This position is at odds with the INS's objection on on the father's involvement in the case in the court of appeals, where the INS argued that a father had no right to have his constitutional challenge heard in the course of deportation proceedings against his child. *See Nguyen*, 208 F.3d at 534. Indeed, the legal basis on which the appeals court allowed Nguyen's father to intervene in the appeal is unclear. The general rule -- that outsiders to a deportation proceeding are not permitted to intervene in the appeal therefrom -- has been so uniformly followed that Fitzroy Wedderburn did not attempt to join in his son's appeal in this case.

Ginsberg and Souter, found that the plaintiff in fact met the *Powers* test, in that her father had been hindered from asserting his own claim when he was dismissed from the case by the district court. 523 U.S. at 473 (Breyer, J., dissenting).

Here, Fitzroy Wedderburn was hindered in asserting his own rights by the lack of any effective mechanism for doing so. The need for him to assert those rights was unknown until Kevin's application for citizenship was denied by the INS Office of Administrative Appeals on August 13, 1998. Kevin was ordered deported less than a week later, and there was no established procedure for Fitzroy to intervene in Kevin's deportation proceeding to assert his own constitutional rights.[4] In procedural and practical terms, Fitzroy was more hindered than Lorelyn Miller's father was from defending his constitutional rights. Thus, under *Miller*, Kevin Wedderburn has standing to raise his father's gender discrimination claim.

In deciding *Nguyen*, the Court will undoubtedly clarify many of the issues raised in *Miller* -- standing to bring a parent's gender discrimination claim, the proper standard of review for such a claim, and the outcome of that analysis. Section 1432, the INA provision at issue here, is a parallel provision to § 1409. Because the two provisions overlap so substantially, certiorari is warranted so that *Nguyen* and this case can be considered together.

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[4] *See supra* n. 3. In *Miller*, the father could and did join in the declaratory judgment action brought by his daughter, but was dismissed from the case. 523 U.S. at 426. The father did not participate in the appeal, presumably because the case had been transferred to the District of Columbia. *Id.* at 427.

## II. THIS CASE ALSO RAISES AN IMPORTANT QUESTION OF WHETHER CITIZENSHIP MAY BE CONDITIONED ON A CHILD'S LEGITIMACY OR THE MARRIAGE OF HIS PARENTS.

Section 1432(a)(3) restricts a child's ability to obtain citizenship through a single naturalized parent based upon the child's legitimacy and the marital status of his parents. Under this Court's previous decisions, these legitimacy-related distinctions violate the Equal Protection clause of the Fifth Amendment unless they are substantially related to an important government goal. *See Clark v. Jeter,* 486 U.S. 456, 461 (1988). Although the court of appeals noted the legitimacy-based distinctions in § 1432(a)(3), it failed to examine them, effectively subjecting them to a standard of review less demanding than rational basis review -- no review at all. Because this Court has applied the same "intermediate" level of scrutiny to discrimination based on legitimacy as to discrimination based on gender, its treatment of the gender discrimination claims in *Nguyen* will shed considerable light on Kevin's claim of legitimacy-based discrimination in this case – an additional reason why the two cases should be considered together.

### A. Section 1432(a)(3)'s Legitimacy-Related Distinctions and the Proper Standard of Review

Read literally, § 1432(a)(3) completely forecloses citizenship for legitimated children whose parents never married each other. Under the first clause of § 1432(a)(3), children in the custody of one parent may derive citizenship only if their parents are "legally separated." The court of appeals held that this phrase required the parents' previous marriage to each other, thus denying derivative citizenship through one naturalized parent to children whose parents never married each other, even when the non-custodial parent

is unavailable and the naturalized parent has taken full legal responsibility for the child. Under the court of appeals' interpretation, citizenship derived through one naturalized parent is generally unavailable to children whose parents have never married.

The only exception to this rule is that, under the second clause of § 1432(a)(3), a child who has not been legitimated may derive citizenship from his naturalized mother. The court of appeals noted that this provision gives illegitimate children "an extra route to citizenship, one not enjoyed by legitimate (or legitimated) offspring." *Wedderburn*, 215 F.3d at 802 (App. 14a). The court made no further comment on this anomalous provision, which creates a perverse incentive for fathers not to legitimate their children. Perhaps the court thought that a classification that benefitted illegitimate children, rather than putting them at a disadvantage, raised no equal protection problem. That belief, however, is contradicted by this Court's prior decisions. *See, e.g., Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 (1982).

Although the court of appeals noted that § 1432(a)(3) discriminates against legitimated children whose parents have never married, it displayed no interest in this disparate treatment and applied no scrutiny to the distinctions drawn in the statute. Instead, the court condoned these distinctions, commenting cavalierly that Kevin's real problem was that his father "legitimated him on the cheap: by acknowledging his status as Kevin's parent rather then by marrying his mother." *Wedderburn*, 215 F.3d at 802 (App. 14a). This approach perpetuates old prejudices and conflicts with basic principles long established by this Court. Ironically, it also runs counter to the overall approach of the INA, which looks to the law of the child's or father's domicile in defining the "legitimation" acceptable under the statute, without requiring the parents' marriage. *See* 8 U.S.C. § 1101(c).

In a line of cases beginning with *Levy v. Louisiana,* 391 U.S. 68 (1968), over thirty years ago, this Court has condemned the government's unequal treatment of children born out of wedlock. In *Trimble v. Gordon,* 430 U.S. 762, 769-70 (1977), the Court struck down an Illinois probate law that, like § 1432(a)(3), denied a benefit to children simply because their parents had never married. (In *Trimble,* as in this case, the child's father had legally acknowledged his paternity, publicly held the child out as his, contributed financially to the child's support, and otherwise treated the child as his own, but had not married the child's mother.) The Court subjected the Illinois statute to scrutiny more exacting than the deferential "rational basis" standard, and concluded that, because the goals of the statute were poorly served by the discriminatory provision, the statute violated the equal protection clause. *Id.* at 767. More recently in *Clark v. Jeter,* 486 U.S. 456 (1988), the Court found unconstitutional a statute limiting the ability of illegitimate children to seek support from their fathers, when legitimate children faced no such limitation.

In *Clark v. Jeter,* the Court clarified that the standard of review applicable to distinctions based on legitimacy is the same standard that applies to gender-based distinctions: intermediate scrutiny, in which the statutory provision at issue must bear a substantial relationship to an important governmental goal. 486 U.S. at 462. If *Nguyen* confirms, as *Miller* and the cases interpreting it suggest, that the proper standard of review for gender-based distinctions in citizenship statutes is heightened scrutiny, then *Nguyen* will provide guidance how that level of scrutiny should operate here. Although the statute at issue in *Nguyen* does not draw these particular legitimacy-based distinctions, the analysis in *Nguyen* is likely to suggest that the legitimacy-based discrimination in § 1432(a)(3) merits more scrutiny than it received in the court of appeals' decision here.

B. Widespread Changes in the Law of Legitimation

The approach of the court of appeals is even more troubling because the trend toward treating children equally under the law regardless of their legitimacy or the means of their legitimation has only expanded since *Trimble* and *Jeter* were decided. In addition to this country, over 30 countries around the world now permit fathers to legitimate their children without marrying the children's mothers, and accord children legitimated in this way the same legal rights as children born to married parents.[5] The INA itself looks to the law of the father's or child's domicile in setting the requirements for "legitimation" under the statute -- an approach that recognizes a child's legitimation even if the applicable law does not make the parents' marriage a condition for legitimation. *See* 8 U.S.C. § 1101(c). Moreover, the analogous § 1409 expresses no preference for legitimation by marriage over legitimation by any other means. Finally, newly enacted legislation, providing automatic citizenship for children of native-born *and* naturalized parents, contains no requirement that the parents of legitimated children must have been married.[6]

The "legal separation" language of § 1432(a)(3), which was last revised in 1940, likely reflects the old presumption

---

[5] These countries include the 26 member states of the European Convention on Human Rights, Jamaica, several Latin American countries, and the People's Republic of China. *See* N. Johnson, *Recent Developments: The Breadth of Family Law Review Under the European Convention on Human Rights,* 36 HARV. INT'L L.J. 513 (1995); Comment, *The Effects of Intercountry Adoptions on Biological Parents' Rights,* 22 LOYOLA L. A. INT'L & COMP. L. REV. 251 (1999).

[6] *See* Section III below for the text of the new statute.

that a child's legitimation would necessarily encompass the marriage of his parents. The court of appeals endorsed this old view in its description of legitimation without the parents' marriage as legitimation "on the cheap." This approach conflicts with the large and growing body of law permitting legitimation without marriage, and also creates a conflict between different provisions of the INA. A parent who has fully complied with his country's requirements for legitimating his child risks finding out too late that he can never share United States citizenship with that child because he never married the child's other parent. Perversely, the statute also discourages a father's responsible act of legitimating his child, rewarding children who have not been legitimated with "an extra route to citizenship" through a single mother. *Wedderburn,* 215 F.3d at 802 (App. 14a).

The statute's goal of ameliorating harshness and promoting family unity for naturalizing families -- the purpose identified by the government for § 1432 -- is ill-served by its distinctions drawn on the basis of legitimacy and parental marriage. The statute's discriminatory treatment of children born to parents who have not married each other, condoned by a court of appeals that failed to engage in even cursory review, merits this Court's attention in order to prevent further confusion over the applicable standard of review and appropriate analysis.

## III. A REMEDY FOR THE STATUTE'S DEFECTS IS AVAILABLE.

If the Court finds the distinctions drawn in § 1432(a)(3) unconstitutional, the simple elimination of the discriminatory language from the statute will provide Kevin with a remedy. The INA expressly provides for the excision of unconstitutional provisions in § 406, which states that "[i]f any particular provision of this Act, or the application thereof to any person or circumstance, is held invalid, the remainder of the Act . . .

shall not be affected thereby." Eliminating the discriminatory language produces a new version of § 1432(a)(3) requiring only "[t]he naturalization of the parent having legal custody of the child." Because Fitzroy had legal custody of Kevin at the time that he naturalized, Kevin can derive citizenship from his father under a constitutional version of the statute.[7]

When a court determines that a provision of a statute violates Equal Protection, it may remedy that violation by striking the offending portions if Congress would likely prefer their excision to other alternatives. *Califano v. Westcott,* 443 U.S. 76, 89-93 (1979); *Welsh v. United States,* 398 U.S. 333, 361 (1970). Here, Congress has provided a clear statement as to its preferences in its recent enactment of amendments to § 1432. Those amendments repeal § 1432 entirely and substitute in its place a new provision, 8 U.S.C. § 1431, which provides:

> (a) A child born outside of the United States automatically becomes a citizen of the United States when all of the following conditions have been fulfilled:
>
> > (1) At least one parent of the child is a citizen of the United States, whether by birth or naturalization.

---

[7] The court of appeals expressed some doubt whether Kevin was in the legal custody of his father Fitzroy at the relevant times. In this, the court was mistaken. Kevin's mother relinquished legal custody of Kevin to Fitzroy in 1982. (App. 31a.) And, under prior immigration decisions, Fitzroy is presumed to have had legal custody of Kevin as of 1986, when he legitimated Kevin. *See Matter of Rivers,* 17 I & N Dec. 419, 422 (BIA 1980). Because Fitzroy's custody of Kevin was never removed or legally transferred to anyone else, Kevin remained in Fitzroy's legal custody when Fitzroy naturalized.

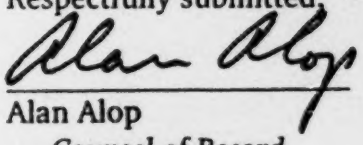
> (2) The child is under the age of eighteen years.
>
> (3) The child is residing in the United States in the legal and physical custody of the citizen parent pursuant to a lawful admission for permanent residence.

Child Citizenship Act of 2000, Pub. L. No. 106-395; 114 Stat. 1631) to be codified at 8 U.S.C. § 1431(a) (signed by the President on October 30, 2000). The new statute eliminates all of the discriminatory language that served as an obstacle to Kevin's claim of citizenship. While the new statute does not apply to Kevin -- the acquisition of citizenship status is generally governed by the statute in effect at the time such acquisition occurred, *see* C. Gordon, S. Mailman, & S. Yale-Loehr, *Immigration Law and Procedure*, § 98.03(2) (1999) -- it clearly demonstrates that Congress would not object to the excision of § 1432(a)(3)'s discriminatory portions, which would yield a result almost identical to the new statute.

## CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the Court should hold this petition until it can remand the case for consideration in light of its decision in *Nguyen*.

Respectfully submitted,



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November 29, 2000

(2) Supreme Court, U.S.
FILED

No. 00 895 NOV 29 2000

# In The

# Supreme Court of the United States

KEVIN WEDDERBURN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For a Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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## TABLE OF CONTENTS

Appendix A

*Wedderburn v. Immigration and Naturalization Service*, 2000 U.S. App. LEXIS 22446 (Aug. 31, 2000) ..... 1a

Appendix B

*Wedderburn v. Immigration and Naturalization Service*, 215 F.3d 795 (7th Cir. 2000) ..... 2a

Appendix C

Board of Immigration Appeals Decision, In re Kevin Wedderburn, April 14, 1999, (unreported) ..... 15a

Appendix D

Oral decision of the Immigration Judge, August 19, 1998 (unreported) ..... 21a

Appendix E

Decision of Immigration and Naturalization Service, Office of Administrative Appeals, In re Kevin Wedderburn, August 13, 1998 (unreported) ..... 22a

Appendix F

Decision of Immigration and Naturalization Service, Chicago, Illinois, In re Kevin Wedderburn, March 3, 1998 (unreported) ..... 27a

Appendix G

Letter of Julie Hines, August 13, 1982 ..... 31a

Appendix H

Immigration and Naturalization Service "Notice of Custody Determination" regarding Kevin Wedderburn, March 12, 1998 ..... 32a

KEVIN WEDDERBURN, Petitioner, v. IMMIGRATION AND NATURALIZATION SERVICE, Respondent.

No. 99-2241

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

2000 U.S. App. LEXIS 22446

August 31, 2000, Decided

NOTICE:
[*1] DECISION WITHOUT PUBLISHED OPINION

PRIOR HISTORY:
Original Opinion of June 1, 2000, Reported at: 2000 U.S. App. LEXIS 12011.

JUDGES:
Before Hon. RICHARD A. POSNER, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon. KENNETH F. RIPPLE, Circuit Judge.

OPINION:

Petition for Review of an Order of the Board of Immigration Appeals.

Order

Petitioner filed a petition for rehearing and petition for rehearing en banc on July 17, 2000. No judge in regular active service has requested a vote on the petition for rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

Kevin Wedderburn, Petitioner,

v.

Immigration and Naturalization Service,
Respondent.

No. 99-2241

United States Court of Appeals
for the Seventh Circuit

Argued Jan. 5, 2000.

Decided June 1, 2000.

COUNSEL:
For KEVIN WEDDERBURN, Petitioner: Lauren L. McFarlane, LEGAL ASSISTANCE FOUNDATION OF CHICAGO, Chicago, IL USA.

For IMMIGRATION AND NATURALIZATION SERVICE, Respondent: Samuel Der-Yeghiayan, IMMIGRATION & NATURALIZATION SERVICE, Chicago, IL USA. Doris Meissner, IMMIGRATION AND NATURALIZATION SERVICE, Office of the General Counsel, Washington, DC USA. Gretchen M. Wolfinger, DEPARTMENT OF JUSTICE, Washington, DC USA.

JUDGES:
Before Posner, Chief Judge, and Easterbrook and Ripple, Circuit Judges.

Easterbrook, Circuit Judge.

Children born outside the United States, of alien parents, acquire U.S. citizenship automatically if before their eighteenth

birthday they move to the United States, and one or both of their parents become U.S. citizens. Section 321(a) of the Immigration and Nationality Act, 8 U.S.C. § 1432(a). Kevin Wedderburn, who was born in Jamaica of Jamaican parents, contends that he became a citizen on June 2, 1993, four months before his eighteenth birthday, when his father Fitzroy Wedderburn became a naturalized United States citizen. Immigration officials, by contrast, believe that Kevin is not a U.S. citizen because his mother, Julie Hines, remains a citizen of Jamaica. Kevin has been ordered deported because of his criminal record (he was sentenced to six years' imprisonment in 1995 for aggravated sexual assault of a boy under nine years of age), and if Kevin is an alien that criminal conviction not only supports removal but also forecloses all avenues of discretionary administrative relief and judicial review. But a person ordered removed is entitled to review of the questions whether he is an alien, and whether he committed a felony requiring removal. *Yang v. INS*, 109 F.3d 1185, 1192 (7th Cir. 1997). *See also, e.g., Solorzano-Patlan v. INS*, 207 F.3d 869 (7th Cir. 2000); *Xiong v. INS*, 173 F.3d 601 (7th Cir. 1999). Kevin does not deny that his criminal conviction requires removal, if he is an alien. (It is irrelevant for current purposes whether that conviction is best classified under 8 U.S.C. § 1101(a)(43)(A), as "sexual abuse of a minor", or § 1101(a)(43)(F), as a "a crime of violence . . . for which the term of imprisonment [is] at least one year".) Thus everything turns on citizenship: if Kevin is a citizen, the order of deportation must be set aside, but if he is not a citizen we must dismiss his petition for want of jurisdiction.

Kevin was born in Jamaica on October 30, 1975. His parents were not married and did not marry each other later--though on June 5, 1986, Fitzroy added his name to Kevin's birth certificate as the father, which under Jamaican law means that Kevin is a legitimate child. Before legitimating Kevin, Fitzroy moved to the United States and married. His wife, Velma, became a U.S. citizen in 1986 and filed a petition for a visa that would allow Kevin to live in the United States. When he was

eleven, Kevin came to the United States, but after three years in New York with Fitzroy and Velma, he moved to Illinois to live with his paternal grandmother.

Whether these events made Kevin a citizen depends on § 321(a), which reads:

> A child born outside of the United States of alien parents . . . becomes a citizen of the United States upon fulfillment of the following conditions:
>
> (1) The naturalization of both parents; or
>
> (2) The naturalization of the surviving parent if one of the parents is deceased; or
>
> (3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
>
> (4) Such naturalization takes place while such child is under the age of eighteen years; and
>
> (5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years.

Kevin meets the conditions in clauses (4) and (5), so he is a citizen if any one of clauses (1) to (3) applies. Julie Hines has not naturalized, so he does not satisfy clause (1). Nothing in the record suggests that Julie has died, so Kevin does not satisfy

clause (2). Clause (3) offers two options. Kevin does not satisfy the latter, involving his mother's naturalization, not only because Julie has not become a U.S. citizen but also because his paternity has been established by legitimation. He does not meet the former option, involving naturalization of the parent with legal custody, because his parents have not undergone "a legal separation" and it is unclear whether Fitzroy had "legal custody" of Kevin at the time. His residence at the time of Fitzroy's naturalization was with his paternal grandmother, so the BIA's conclusion that one parent's permanent physical custody with the other's consent is "legal custody" does not assist Kevin. *See Matter of M--*, 3 I. & N. Dec. 850 (1950). Kevin does not meet the requirements of § 321(a).

Kevin asks us to read § 321(a)(3) to treat him as a citizen notwithstanding his inability to meet the statutory conditions. His argument draws on what he believes is a statutory incongruity. Section 101(c)(1), 8 U.S.C. § 1101(c)(1), which defines the term "child" for purposes of Title III of the Act (which comprises § 321), includes legitimated and adopted children in the set eligible for citizenship.

> The term "child" means an unmarried person under twenty-one years of age and includes a child legitimated under the law of the child's residence or domicile . . . if such legitimation or adoption takes place before the child reaches the age of 16 years . . . , and the child is in the legal custody of the legitimating or adopting parent or parents at the time of such legitimation or adoption.

According to Kevin, he is a "child" under this definition, so § 321(a)(3) should be read to deem him a citizen. The premise of this argument is incorrect; he is not a "child" under § 101(c)(1), because he was not in Fitzroy's custody at the time of the legitimating event. In June 1986, when Fitzroy legitimated Kevin by adding his name to Kevin's birth certificate, Fitzroy was living in New York, while Kevin was living in Jamaica

with one of his grandmothers. But even if Kevin were a "child" under §101(c)(1), this would not by itself make him a citizen. Section 101 defines terms; the substantive requirements of citizenship appear elsewhere in the Act. Only with respect to § 322, 8 U.S.C. § 1433, which permits a U.S. citizen parent to obtain citizenship for a "child" in his "legal custody," does the definition have independent significance. (Fitzroy has not sought to confer citizenship on Kevin via § 322.) Both § 101(c)(1) and § 321(a) equate legitimated children to legitimate ones. Kevin's problem is not the nature of this equation, but the fact that he does not qualify under § 321(a) whether he is "illegitimate," "legitimated," or "legitimate." The label does not make a difference, because Julie Hines is alive (we must assume) and has not become a U.S. citizen, and Kevin has never been in his father's "legal custody [after] there has been a legal separation of the parents". Putting § 101 together with § 321 does not help Kevin, and appealing to the statutes' spirit, as Kevin does, does not alter the statutes' language.

We may assume, as Kevin insists, that, when § 321(a) was enacted, the predominant, if not the exclusive, means of legitimating an illegitimate child was the parents' subsequent marriage. When legitimation equals marriage, then a dissolution will produce "legal separation" and "legal custody", so that legitimated children can take full advantage of the first possibility under § 321(a)(3). When some foreign nations made it possible to legitimate a child without marriage, or indeed abolished the distinction between legitimate and illegitimate children, this created the possibility that the legitimated child could not use § 321(a)(3)'s first clause. Kevin sees this as a "gap" that we should close; but it is not a proper function of interpretation (as opposed to amendment) to ensure that every development in foreign law has a corresponding benefit under U.S. law. Kevin has the same options he and others like him possessed before Jamaica amended its law in 1976 to treat persons in his position as legitimate--Fitzroy's signature on the birth certificate did more to affect his status as a recognized

father than to alter Kevin's status under Jamaican law--the amendment of Jamaican law does not have any significance for the proper interpretation of § 321(a)(3).

At oral argument, the judges and counsel explored two different, and perhaps more promising, ways of approaching § 321(a). One possibility is that "legal custody" and "legal separation of the parents" have a technical meaning, perhaps by incorporating Jamaican law, that enables Kevin to satisfy 321(a)(3). The other is that Congress acted irrationally, and thus unconstitutionally, by requiring both "legal custody" and "legal separation." The parties submitted post-argument memoranda concerning the first of these possibilities. These memoranda show that Kevin did not raise either line of argument before the Board of Immigration Appeals, or for that matter in his appellate briefs, so they have been waived. But we cover them briefly nonetheless, if only to show that Kevin's deportation is not the result of a blunder by his lawyers.

"Legal custody" and "legal separation of the parents", as words in a federal statute, must take their meaning from federal law. On this both sides agree. But federal law may point to state (or foreign) law as a rule of decision, and this is how the INS has consistently understood these terms. *Matter of H--*, 3 I. & N. Dec. 742 (1949), concludes that the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings. It is thus apparent that the term "legal separation," can refer only to a situation where there has been a termination of the marital status. Since the subject's parents were not lawfully joined in wedlock, they could not have been legally separated. 3 I. & N. Dec. at 744. The last line of this quotation supposes, however, that Jamaican law limits "a limited or absolute divorce obtained through judicial proceedings" to situations in which a marriage is being dissolved. Because the INS determines the existence, validity, and dissolution of wedlock using the legal rules of the place where the marriage was performed (or dissolved), *see DeSylva v. Ballentine*, 351 U.S.

570, 580-82, 100 L. Ed. 1415, 76 S. Ct. 974 (1956); [**10] *Matter of Miraldo*, 14 I. & N. Dec. 704 (1974); *Matter of M--*, it is at least possible that Jamaica permits unmarried persons to obtain a "legal separation" and an award of "legal custody" of the children. But Kevin's lawyers concede that, after a diligent search, they could not find any Jamaican law to that effect. They represent that marriage in Jamaica is a formal subject (Jamaica does not, for example, recognize common-law marriage) and that legal separation is limited to persons who have been married. In this respect, at least, Jamaican law tracks the expectation voiced in *Matter of H--*, so Kevin asks us to reject the whole approach of *Matter of H--* and to treat not only the definition of the words in § 321(a)(3), but also their referents, as matters of federal law. Many federal statutes now prescribe some rules of family law; for example, 1 U.S.C. § 7 defines marriage, wherever that term appears in the United States Code, as "a legal union between one man and one woman as husband and wife". *See* Jill Elaine Hasday, *Federalism and the Family Reconstructed*, 45 U.C.L.A. L. Rev. 1297 (1998) (describing other national resolutions of family-law matters). Section 321(a) is just one more example of the displacement of local law, Kevin insists.

That does not get Kevin very far if we understand "legal separation" normally. See Black's Law Dictionary 1369 (7th ed. 1999) (defining "separation" as "an arrangement whereby a husband and wife live apart from each other while remaining married, either by mutual consent or by judicial decree; the act of carrying out such an arrangement. Also termed legal separation; judicial separation."). Just as *Matter of H--* says, domestic relations law in the United States treats "legal separation" as the judicial suspension or dissolution of a marriage. Kevin asks us to give it a completely different meaning, equating "legal separation" with "not being legally joined." Under this definition, Fitzroy Wedderburn and Julie Hines were "legally separated" from the moment they met (indeed, were "legally separated" before they met). Fitzroy

would be "legally separated" from more than six billion people: everyone on the planet other than his wife. That is not a plausible interpretation of "legally separated," however, first because it leaves no work for "legally" (a word that in a construction like this usually refers to a judicial decree), and second because it is impossible to see how people who have never been joined can be separated. Separation implies a comparison to a former state of joinder. South America and Africa have been "separated" because they were once joined in Pangaea and Gondwanaland; but Hawaii, although separate from the continental United States, has never been "separated" from it. At all events, the BIA did not exceed its delegated powers when reading "legally separated" as drawing a distinction between cohabitation in marriage and a later state of living apart (with or without divorce); reading a phrase just as Black's Law Dictionary does can not be described as excessively freewheeling interpretation. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, Inc., 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984).

What then of the possibility that § 321(a)(3) is irrational because it requires proof of both "legal custody" and "legal separation"? Because the conjunction of "legal separation" with "legal custody" does not concern any suspect class, a rational basis is enough to defeat a constitutional challenge. It is not hard to think of a basis. Many legally separated parents share custody of their children. Congress did not have to treat divorce (or any other form of legal separation) as the equivalent of one parent's death; § 321(a) as written means that in shared-custody cases both parents must naturalize, and this is entirely rational. As for the reverse--legal custody in the naturalizing parent, but not legal separation of the parents--this situation can come about when one parent has been deemed unfit to have custody, perhaps because of mental or medical conditions, or is physically unable to have custody (perhaps because of incarceration). Often these conditions will pass, and the parents will resume living together with joint custody of the child. Congress

rationally could conclude that as long as the marriage continues the citizenship of the children should not change automatically with the citizenship of a single parent. After all, gaining U.S. citizenship by naturalization means disavowing one's original citizenship. 8 U.S.C. § 1448(a)(2). (Usually disavowal means losing the original citizenship, though some foreign nations believe that citizenship acquired at birth cannot be lost, and hence treat naturalized U.S. citizens as dual nationals.) Both the child and the surviving but non-custodial parent may have reasons to prefer the child's original citizenship, which may affect obligations such as military service and taxation. Section 321(a) limits automatic changes to situations in which the other parent has been removed from the picture--either by death or by "legal separation." In a small subset of the cases in which there is legal custody it may prove impossible to meet the legal-separation requirement even in the long run--perhaps because a child was legitimated without marriage, perhaps because the nation with jurisdiction over the marriage does not recognize divorce or legal separation. *See Matter of Miraldo*. But for these cases § 322 permits the custodial parent to obtain U.S. citizenship for his or her child as a matter of right, by filing an application. A law does not become unconstitutional just because it does not fit 100% of the cases; mismatches between legal rules and the world at large are inevitable. *E.g., Califano v. Jobst*, 434 U.S. 47, 54 L.Ed. 2d 228, 98 S. Ct. 95 (1977). But § 321(a) is a mismatch for a custody-but-not-legal-separation situation only when read independently of 322, which would be unsound.

Although Kevin does not contend that § 321(a)(3) is irrationally arbitrary, he has waged a vigorous constitutional challenge on other grounds. Relying on *Miller v. Albright*, 523 U.S. 420, 140 L. Ed. 2d 575, 118 S. Ct. 1428 (1998), he contends that § 321(a)(3) violates the equal protection component of the fifth amendment's due process clause. According to Kevin, the statute "creates an invidious classification between naturalized mothers of illegitimate children, who can pass on the benefit of citizenship, and naturalized fathers of legitimated children, who

cannot." Miller concerned the constitutionality of 8 U.S.C. § 1409, which provides that illegitimate children inherit the citizenship of their mothers, while fathers can transmit U.S. citizenship to offspring only if additional conditions are satisfied. Three groups of two Justices apiece made up the majority, and Lorelyn Miller, the person claiming citizenship through her father, lost in the end. But Kevin believes that we can patch different groups of Justices together to produce a majority for him:

> Under the reasoning adopted by five Justices of the Supreme Court in Miller . . . , Kevin Wedderburn has third-party standing to challenge this gender-based classification. [See 523 U.S. at 431-33 (Stevens, J., joined by Rehnquist, C.J.), 473-74 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting).] Under the reasoning of another group of five Justices . . . , a gender-based distinction like the one in INA § 321(a)(3) is subject to heightened or intermediate scrutiny, which requires that the distinction be tailored to protect an important state interest. [See 523 U.S. at 451-52 (O'Connor, J., joined by Kennedy, J.), 476-81 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting).] Because the gender-based classification in INA § 321(a)(3) lacks any justification, the statute violates the parental right to equal protection under the Constitution.

Kevin's supposition that we can put together two concurring opinions with one dissenting opinion to produce a five-Justice majority on each contested issue overlooks the way the Justices counted votes in *Miller* itself. How votes should be aggregated on appellate courts is an interesting and debatable question. See Maxwell L. Stearns, *Should Justices Ever Switch Votes?: Miller v. Albright in Social Choice Perspective*, 7 Sup. Ct. Econ. Rev. 87 (1999). How votes were counted in *Miller* (and thus how an inferior court should predict that they will be counted in a similar future case) can be determined by inspection.

*Miller* needed to win on each of three issues: standing, redressability, and the merits. She lost two votes on each, and thus lost a total of six votes and the case. Justices O'Connor and Kennedy believed that only the father has standing, for the right to pass citizenship to one's children belongs to the father and not the child. 523 U.S. at 445-51. "The statute . . . accords differential treatment to fathers and mothers, not to sons and daughters." Id. at 445. That is equally true of § 321(a)(3). Justices Scalia and Thomas believed that even if the statute at issue in Miller were unconstitutional, no remedy would be available because "the Court has no power to provide the relief requested: conferral of citizenship on a basis other than that prescribed by Congress." 523 U.S. at 453. That, too, is equally true of § 321(a)(3). Finally, Chief Justice Rehnquist and Justice Stevens believed that the rational-basis test applies to statutes such as § 1409, and that a distinction between citizen fathers and citizen mothers of illegitimate children is rationally related to legitimate governmental objectives. 523 U.S. at 433-45.

None of the six Justices who voted against Miller suggested that a constitutional challenge to § 321(a)(3) would receive more favorable consideration, unless presented by the father. And the three dissenting Justices implied that a person in Kevin's position could lose even their votes. Justice Breyer explained that his view on standing was influenced by the fact that Lorelyn's father, Charlie Miller, tried to sue in his own name, only to have his suit dismissed for lack of standing. By obstructing Charlie's suit, Justice Breyer concluded, the Department of Justice enabled Lorelyn to litigate. 523 U.S. at 473-74 (Breyer, J., joined by Souter & Ginsburg, JJ., dissenting). Fitzroy Wedderburn, by contrast, has not sought to bestow citizenship on Kevin. Justice Breyer also thought it important to both redressability and the merits that Lorelyn claimed a right to citizenship at birth. He distinguished situations in which events after birth affect citizenship. Id. at 475, 481, 488-89. Kevin Wedderburn could not count on Justice Breyer's support.

We have been supposing so far that § 321(a)(3) implements a form of sex discrimination. That would be so if Kevin were illegitimate. Then Julie Hines, but not Fitzroy Wedderburn, could make Kevin Wedderburn a U.S. citizen by naturalization. But Jamaica now deems Kevin legitimate, and § 321(a) treats him the same way. The second option of § 321(a)(3) drops out. Legitimated children become citizens if both parents naturalize, if the surviving parent naturalizes, or if the parent having "legal custody" naturalizes following the parents' "legal separation." Nothing depends on the sex of the parent (or parents) who naturalize or have custody.

To see this, suppose that Julie Hines had moved to the United States with Kevin, while Fitzroy Wedderburn had remained in Jamaica, and that Julie later naturalized. Julie's immigration and naturalization would not have affected Kevin's citizenship because the second option under § 321(a)(3) does not apply to legitimated children. By equating legitimated and legitimate children in both § 101(c)(1) and § 321(a), Congress avoided the kind of discrimination about which Kevin complains. An illegitimate child who has never been legitimated would have a claim (though in light of *Miller* it would not be a strong one); but a legitimated child such as Kevin has no sex-discrimination claim at all. Perhaps this explains the odd locution of Kevin's core argument, which we have already quoted: that § 321(a)(3) "creates an invidious classification between naturalized mothers of illegitimate children, who can pass on the benefit of citizenship, and naturalized fathers of legitimated children, who cannot" (emphasis added). In this formulation, legitimation and not sex makes the difference. Anyway, the premise of Kevin's contention is untrue. A father of a legitimated child automatically passes citizenship to the child, if the mother also becomes a citizen, or has died, or if the father acquired "legal custody" of the child following a "legal separation" from the mother. A father also may pass citizenship to a legitimated child in his "legal custody" by applying for a certificate of citizenship under § 322.

Kevin does not contend that Congress violated the Constitution by equating legitimated and legitimate children, and no such contention would be tenable. The second clause of § 321(a)(3) does not discriminate against illegitimate children; instead it gives them an extra route to citizenship, one not enjoyed by legitimate (or legitimated) offspring. In the end, the nub of Kevin's argument must be that Fitzroy legitimated him on the cheap: by acknowledging his status as Kevin's parent rather than by marrying his mother, a step that (given Jamaican law) made the first option of § 321(a)(3) unavailable to him. Fitzroy could have compensated by using § 322, which permits a citizen who has a child in his "legal custody" to obtain citizenship for a child without regard to "legal separation" from the other parent--though this may not have been possible, since Kevin was not in Fitzroy's custody at the time of the legitimating event. Kevin himself, as a lawful permanent resident, could have applied for citizenship. But none of these things happened, and we have already explained why the Constitution does not require Congress to anticipate and accommodate every possibility created by foreign matrimonial law.

Kevin is not a citizen of the United States, so his petition for review is DISMISSED.

**U.S. Department of Justice**

Executive Office for Immigration Review
*Board of Immigration Appeals*
*Office of the Clerk*

*P.O. Box 8530*
*5201 Leesburg Pike, Suite 1300*
*Falls Church, Virginia 22041*

Palumbo, Lisa J.
111 W. Jackson St. 3rd Floor,
Chicago, IL 60604-3805

Office of District Counsel/CH
P.O. Box A-3423
Chicago, IL 60690

April 19, 1999

WEDDERBURN, KEVIN
A#: 41-362-089

Enclosed is a copy of the board's decision an order in the above-referenced case.

Very Truly Yours,

Paul W. Schmidt
Chairman

Enclosure

Panel Members:

HURWITZ, GERALD S.
MORRIS, JAMES P.
SCIALABBA, LORI L.

Decision of the Board of Immigration Appeals

U.S. Department of Justice
Executive Office for Immigration Review

File A41 362 089 - Chicago Date APR 19 1999

In re: KEVIN WEDDERBURN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Lisa Palumbo, Esquire
Legal Assistance Foundation
of Chicago
111 W. Jackson Blvd.,
Third Floor
Chicago, Illinois 60604-3502

CHARGE:

Order: Sec. 241(a)(2)(A)(iii), I&N Act [8 U.S.C. & § 1251(a)(2)(A)(iii) - Convicted of aggravated felony

APPLICATION: Termination of proceedings

In a decision dated August 19, 1998, an Immigration Judge found the respondent deportable as charged and determined that the respondent was ineligible for relief from deportation. The respondent has appealed the Immigration Judge's decision. The appeal will be dismissed.

The respondent is a native of Jamaica who entered the United States as a lawful permanent resident on October 9, 1987. The record reflects that the respondent was born out of wedlock

on October 13, 1975, to Julie Hines and Fitroy Wedderburn, both of whom were citizens of Jamaica at the time. Thereafter, Fitzroy Wedderburn came to the United States and married Velma Wedderburn, a United States citizen. On June 5, 1986, the respondent's father's name was added to the respondent's birth registration form (Exh. 3), thereby legitimating the respondent in accordance with the Status of Children Act of 1976. On October 9, 1987, the respondent was admitted to the United States as a lawful permanent resident based upon an immediate relative visa petition filed on his behalf by his stepmother (Exh. 4). One June 2, 1993, when the respondent was 17 years old, his father became a naturalized United States citizen. The respondent's mother, Julie Hines, has never naturalized.

On January 25, 1995, the respondent was convicted in the Circuit Court of Cook County, Illinois for the offense of aggravated criminal sexual assault, in violation of Chapter 38, section 12-14B(2) of the Illinois revised Statutes. For this offense, he was sentenced to a term of imprisonment of 6 years. On the basis of this conviction, the Immigration and Naturalization Service ("Service") issued an Order to Show Cause (Form I-221), charging the respondent with deportability under section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C & 1251(a)(2)(A)(iii) (Supp. II 1996), for having committed an aggravated felony. At a hearing before the Immigration Judge, the respondent, through counsel, admitted to all of the factual allegations contained in the Order to Show Cause, with the exception of the allegation that the respondent is a citizen of Jamaica (Tr. At 28-29). In this regard, the respondent asserted that he had derived citizenship from his father, who had naturalized before the respondent reached the age of 18. The Immigration Judge then continued the hearing to permit the respondent to file an Application for Certificate of Citizenship (N-600) withe the Service. The application was denied on March 3, 1998.

After concluding that the respondent had not established derivative citizenship under section 321(a) o the Act, 8 U.S.C & 1432(a), the Immigration Judge found that the respondent's conviction for aggravated criminal sexual assault constitutes an aggravated felony as defined at section 101(a)(43)(F) of the Act, 8 U.S.C. & 1101(a)(43)(F), as "crime of violence (as defined in section 16 of Title 18, United States Code. . .), for which the term of imprisonment is at least one year."[1] The Immigration Judge properly concluded that this conviction rendered the respondent ineligible for a waiver of inadmissiblity under section 212(c) of the Act, 8 U.S.C. & 1182(c) (1994), as a result of amendments made by section 440(d) of Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (AEDPA). *See also Matter of Soriano*, Interim Decision 3289 (A.G.. Feb. 21. 1997).

On appeal, the respondent contends that the Service has not established by clear, convincing and unequivocal evidence that he is an alien (Br. At 5). The burden of proof in establishing alienage in deportation proceedings rests with the Service.

---

[1] Section 101(a)(43)(F) of the Act was amended by section 321(a)(3) of the Illegal Immigration Reform Responsibility Act of 1996, Div. C., Department of Defense Appropriates Act, 1997, Pub. L. 104-208, 110 Stat. 3009-627 ("IIRIRA"). The new definition applies to convictions entered before, on , or after the date of enactment, notwithstanding any other effective date provision. Section 321(b) of the IIRIRA, 110 Stat. at 3009_628; *see also Matter of Batista -Hernandez*, Interim Decision 3321, at 10 (BIA 1997). Furthermore, although the Service does not specify in the Order to Show Cause, nor does the Immigration Judge specify in her written decision, under which subsection of section 101(a)(43) of the Act the respondent's offense should be classified, we agree with the Immigration Judge's finding as explained in the transcript that the applicable subsection is section 101(a)(43)(F) of the Act. (TR. At 37).

*United States ex rel. Bilokumsky v. Tod.*, 263 U.S. 149 (1923); *United States v. Neely*, 281 (7th Cir. 1953). However, once birth in a foreign country has been established, a presumption of alienage arises, and the burden shifts to the respondent to establish United States citizenship. *Matter of Leyva*, 16 I&N Dec. 118, 119 (BIA 1977). The respondent admits, and his birth certificate confirms, that he was born in Jamaica (TR. At 7; Exh. 3; Br. At 1). Therefore, we find that the Service has met its burden to establish the respondent's alienage.

On appeal, the respondent also reiterates his argument that he has derived citizenship through his naturalized father under section 321(a) of the Act. We disagree. Section 321(a) of the Act provides as follows:

A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother of the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes places while such child is under the age of eighteen years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (1) of

this subsection, or the parent naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United States while under the age of eighteen years (emphasis added).

The respondent emphasizes that although he was born out of wedlock, he was legitimated by his father before the respondent was 16 years old, and his father naturalized before the respondent was 18 years old. Despite these actions, however, the respondent cannot derive citizenship under section 321(a) of the Act, as his mother has not naturalized. The respondent argues that "even if the term 'father' is not specifically stated in the statute" at section 321(a)(3), it should be read to "include a situation, like respondent's where the child was born out of wedlock but it is the father from whom the child acquires citizenship, not the mother" (Br. At 7). Otherwise, he contends, the statute would violate the Equal Protection Clause of the United States Constitution. In support of his argument, he cites to *Miller v. Albright*, 523 U.S. 420 (1998), in which the Supreme Court upheld the constitutionality of section 309 of the Act which requires additional proof of paternity to establish citizenship by birth where the citizen parent of a child born abroad and out of wedlock is the child's father, as opposed to the mother. However, that case is not controlling in the instant matter, as it does not address the constitutionality of section 321(a) of the Act. Furthermore, it is well-settled that the Board lacks the authority to rule on the constitutionality of the laws it administers. *See e.g.*, Section 103 of the Act, 8 U.S.C. & 1103 (1994); *Matter of Fuentes-Campos*, Interim Decision 3318, at 10 (BIA 1997); *Matter of C-*, 20& I&N Dec. 529, 532 (BIA 1992); *Matter of Anselmo*, 20 I&N Dec. 25, 30 (BIA 1989). Accordingly, the appeal will be dismissed.

Order: The respondent's appeal is dismissed.

(S/Signature for the Board)

**United States Department of Justice**
**Executive Office for Immigration Review**
**Immigration Court**
**Chicago, Illinois**

File No.: A 41 362 089 August 19, 1998

In the Matter of
Kevin Wedderburn, In Deportation Proceedings
Respondent

Oral Decision of the Immigration Judge

Based upon your admissions based upon what has been marked as Exhibit 1A, 2, 3, 4, and Exhibit 5, based upon a careful review of the specific provisions of the Immigration and Nationality Act, to wit, Section 321(a), Section 309, and Section 101(c), I find that you are not a native or citizen of the United States. I find that there is no express statutory provision in the instant case and therefore based upon careful review of all of the evidence presented to the Court and considering the argument presented by your counsel, I cannot make the finding that you are a citizen of the United States.

Because of the Illegal Immigration and Immigrant Responsibility Act of 1996, you are statutorily ineligible to apply for any form of relief from deportation, and I have no choice but to order that you be deported from the United States. Therefore, I hereby order that you be deported from the United States to Jamaica on the charges contained in the Order to Show Cause.

s/Renetta Smith
Immigration Judge
A 41 362 089 August 19, 1998

(Seal)

**U.S. Department of Justice**
**Immigration and Naturalization Service**

Office of Administrative Appeals
425 Eye Street N.W.
ULLB, 3rd floor
Washington, D.C. 20536

Kevin Anthony Wedderburn
2427 Morgan Point Blvd.
Kissimmee, FL 34743

File: A41 362 089 Office: Chicago Date: Aug. 13, 1998

Application: Application for Certificate of Citizenship under § 341(a) of the Immigration and Nationality Act, 8 U.S.C. § 1452(a)

On Behalf of Applicant: Self-represented

Instructions:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

(Continuation of page 1)

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petition. Id.

Any motion must be filed with the office which originally decided your case along with a fee of $110 as required under 8 C.F.R. 103.7.

For the Associate Commissioner Examinations,

s/Terrance M. O'Reilly, Director
Administrative Appeals Office

(Page 2)

Discussion: The application was denied by the District Director, Chicago, Illinois, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The record reflects that the applicant was born on October 30, 1975, in Jamaica. The applicant's father Fitzroy Wedderburn, was born in Jamaica on January 26, 1946, and became a naturalized U.S. citizen on June 2, 1993. His mother, Julie Hines, was born in 1958 in Jamaica and never became a United States citizen. The applicant's parents never married. The applicant was lawfully admitted for permanent residence on October 9, 1987, on the basis of an approved immediate relative visa petition filed by his step-mother. He claims eligibility for a certificate of citizenship under § 321 of the Immigration and Nationality Act (the Act), 8 U.S.C. 1432, as a child born outside of the United States of an alien parent having legal custody of the child when there has been a legal separation of the parents who subsequently naturalized while the child us under the age of 18 years.

Section 321 (a) of the Act provides, in pertinent part, that:

A child born outside of the United States of alien parents, or of an alien parent and a citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions, and it is immaterial which of the actions occurred last:

(1) The naturalization of both parents; or

(2) The naturalization of the surviving parent if one of the parents is deceased; or

(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the

naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if

(4) Such naturalization takes place while said child is under the age of 18 years; and

(5) Such child is residing in the United States pursuant to a lawful admission for permanent residence at the time of the naturalization of the parent last naturalized under clause (2) or (3) of this subsection, or thereafter begins to reside permanently in the United State while under the age of 18 years.

The record establishes that (1) his father became a naturalized U.S. citizen prior to the applicant's 18th birthday, (2) his father acknowledged him at least prior to the applicant's lawful admission at the age of approximately 12 years of age, (3) the applicant became the beneficiary of an approved visa petition filed by his step-mother, and (4) the applicant was residing in the United States in his father's legal custody as a lawful permanent resident when his father naturalized.

However, in order for the applicant to receive the benefit of § 321 of the Act, there must have been a legal separation of the parents. Matter of H –, 3 I & N Dec. 742 (C.O. 1949), held that the term "legal separation" means either a limited or absolute divorce obtained through judicial proceedings, and where the actual parents of the child were never lawfully married, there could be no "legal separation," of such parents. Therefore, the applicant's father was not legally separated from the mother when his father naturalized. If the parents were never lawfully married, there can be no legal separation, as such, and acknowledgment by a naturalized parent under such circumstances does not result in derivation of U.S. citizenship even though other requisite conditions are satisfied. See INTERP. 320.1(a)(6).

There is no provision under the law by which the applicant could have automatically acquired U.S. citizenship through his father's naturalization. Therefore, the district director's decision will be affirmed. This decision is without prejudice to the applicant seeking U.S. citizenship through normal naturalization procedures.

ORDER: The appeal is dismissed.

UNITED STATES DEPARTMENT OF JUSTICE
THE IMMIGRATION AND NATURALIZATION SERVICE
401 SOUTH STATE STREET, SUITE 800
CHICAGO, ILLINOIS 60605

KEVIN ANTHONY WEDDERBURN A 41 362 089
C/O FITZROY WEDDERBURN DATE: 3/3/1998
31-19-106ST. EAST
ELMHURST, N.Y. 11369

DECISION

Upon consideration, it is ordered that your Application for Certificate of Citizenship N-600) be denied for the following reasons:

SEE ATTACHED

If you desire to appeal this decision, you may do so. Your notice of appeal must be filed within 30 days from the date of the notice, (33 days if this notice was received by mail.) If no appeal is filed within the time allowed, this decision is final. Appeal in your case may be made to:

___ Board of Immigration Appeals in Washington, D.C., on the enclosed Form EOIR-29. (A fee of $110.00 is required).

__X__ Commissioner on the Enclosed Form I-290B. (A fee of $110 is required).

If an appeal is desired, the Notice of Appeal shall be executed and filed with the District Office at 10 W. Jackson Blvd., Chicago, IL (Second floor) together with the required fee. A brief or other written statement in support of your appeal may be submitted with the Notice of Appeal.

Any questions which you may have will be answered by

(Continuation of page 1)

the local immigration office nearest your residence, or at the address in the heading of this letter.

Sincerely yours,

s/Brian R. Pearlman
District Director

Enclosure(s) M-188
Form I-290B

(Page 2_
A 41 362 089

The instant application (Form N-600) requesting issuance of a Certificate of U.S. Citizenship, pursuant to the provisions of Section 3419a) of the Immigration and Nationality Act, as amended, was received at this office on 02/23/98, claiming United States citizenship through your father by virtue of Section 321(a)(1) of the Act. The fee was waived by the authority of the District Director for the Chicago INS office; and the application was approved for an expedited interview by the Assistant District Director for Examinations. The application will be denied.

Section 321(a) (1) of the Immigration Act as amended states, in part, that: "A child born out side of the United States of alien parents. Or of an alien parent and citizen parent who has subsequently lost citizenship of the United States, becomes a citizen of the United States upon fulfillment of the following conditions:
(1) The naturalization of both parents; or,
(2) The naturalization of the surviving parent if one of the parents is deceased; or
(3) The naturalization of the parent having legal custody of the child when there has been a legal separation of the parents or the naturalization of the mother if the child was born out of wedlock and the paternity of the child has not been established by legitimation; and if
(4) Such naturalization takes place while such child is under the age of eighteen years . . ."

A review of the record indicates that you entered the U.S. on Oct. 09. 1987 as the beneficiary of an approved I-130 petition (executed by your stepmother). Your father naturalized on 06/02/93 while you were at the age of seventeen. However, you stated at your interview on 02/27/98 that you were born out of wedlock. Furthermore, your immigrant visa file contains a copy

of your birth certificate with no information concerning your father (thus, attesting to an illegitimate birth.) Alth9ugh your natural father did naturalize on 06/02/93, you cannot automatically acquire U.S. Citizenship because § 321(a)(3) of the Act only allows for the acquisition of U.S. Citizenship through the mother for children born out of wedlock.

This decision is without prejudice to your filing for any other benefit under the Immigration and Nationality Act.

## LETTER OF JULIE HINES

Lot 458 Hallandale Dr. West
Passage Fort
Gregory Park P.O.
St. Catherine
Jamaica West Indies

The Immigration Nationalization Dept.
New York, New York

Dear Sir/Madam

I Julie Hines of the above address swear that Fitz Roy Wedderburn now living in the United States at this address 102-26-29 Ave East, Elmhurst New York 11369 is the father of my son Kevin Wedderburn who was born on the 30th,10,75.

It is my intension to relinquish custody of my son to his father and stepmother who are in the United States for permanent resident.

Sincerely yours

Julie Hines

S.T. Acuttes J.P.
Trelawny
13/8/82

S.T. Gentles, J.P.
Trelawny

**Notice of Custody Determination**

**U.S. Department of Justice**
Immigration and Naturalization Service

File No: A 41-362-089
Date: March 12, 1998

Kevin
WEDDERBURN

Pursuant to the authority contained in section 236 of the Immigration and Nationality Act and part 236 of title 8, Code of Federal Regulations, I have determined that pending a final determination by the Immigration Judge in your case, and in the event you are ordered removed from the United States, until you are taken into custody for removal, you shall be:

- ☐ detained in the custody of this Service.
- ☐ released under bond in the amount of $____
- ☐ released on your own recognizance.

- ☒ You may request a review of this determination by an Immigration Judge.
- ☐ You may not request a review of this determination by an Immigration Judge because the Immigration and Nationality Act prohibits your release from custody.

Diane Esbrook
(Signature of authorized officer)

Deputy Asst. District Director for Deportation
(Title of authorized officer)

Chicago, Illinois
(INS office location)

☒ do ☐ do not request a redetermination of this custody decision by an Immigration Judge.
☒ I acknowledge receipt of this notification.

Wedderburn 3/12/98
(Signature of respondent) (Date)

Bottom of same page:

**RESULT OF CUSTODY REDETERMINATION**

On _____, custody status/conditions for release were reconsidered by:

☐ Immigration Judge ☐ District Director ☐ Board of Immigration Appeals

The results of the redetermination/reconsideration are:
☐ No change - Original determination upheld.
☐ Detain in custody of this Service.
☐ Bond amount reset to _____

☐ Release - Order of Recognizance.
☐ Release - Personal Recognizance.
☐ Other: _____

Supreme Court, U.S.
FILED
FEB 1 2001
CLERK

(3)

No. 00-895

# In the Supreme Court of the United States

KEVIN WEDDERBURN, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

BARBARA D. UNDERWOOD
*Acting Solicitor General*
*Counsel of Record*
STUART SCHIFFER
*Acting Assistant Attorney General*
DONALD E. KEENER
ANNE MURPHY
*Attorneys*
*Department of Justice*
*Washington, D.C. 20530-0001*
*(202) 514-2217*

18pp

## QUESTION PRESENTED

Under 8 U.S.C. 1432(a), a child born abroad to parents who are not United States citizens becomes a citizen of the United States, upon satisfaction of a residency requirement, if both parents are naturalized as United States citizens while the child is under the age of 18. Section 1432(a) also provides, however, for exceptions to the requirement that both parents be naturalized for situations in which: one parent is deceased and the surviving parent is naturalized; the parents are legally separated and the parent having legal custody is naturalized; or the child was born out of wedlock, paternity has not been established by legitimation, and the mother is naturalized. The question presented is:

Whether Section 1432(a) violates the equal protection component of the Due Process Clause of the Fifth Amendment insofar as it does not confer United States citizenship on a legitimate child when only one of the child's two living parents, who are not legally separated, becomes a naturalized United States citizen.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statement | 2 |
| Argument | 6 |
| Conclusion | 14 |


## TABLE OF AUTHORITIES

Cases:


| | |
|---|---|
| *Fiallo* v. *Bell*, 430 U.S. 787 (1977) | 9, 10, 12 |
| *Heckler* v. *Mathews*, 465 U.S. 728 (1984) | 13 |
| *Kleindienst* v. *Mandel*, 408 U.S. 753 (1972) | 12 |
| *Matthews* v. *Diaz*, 426 U.S. 67 (1976) | 8 |
| *Miller* v. *Albright*, 523 U.S. 420 (1998) | 4, 6, 7, 8, 10, 11 |
| *Trimble* v. *Gordon*, 430 U.S. 762 (1977) | 12 |


Constitution and statutes:


| | |
|---|---|
| U.S. Const.: | |
| Art. I, § 8 | 2 |
| Amend. V | 4 |
| Child Citizenship Act of 2000, Pub. L. No. 106-395, §§ 101-102, 114 Stat. 1631-1633 | 14 |
| Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.* (1994 & Supp. V 1999): | |
| 8 U.S.C. 1227(a)(2)(A)(ii) (Supp. V 1999) | 3 |
| 8 U.S.C. 1227(a)(2)(A)(iii) (Supp. V 1999) | 3 |
| 8 U.S.C. 1251(a)(2)(A)(ii) (1994) | 3 |
| 8 U.S.C. 1251(a)(2)(A)(iii) (1994) | 3 |
| 8 U.S.C. 1409 | 4, 5, 6 |
| 8 U.S.C. 1409(a) | 4, 7, 8, 10 |
| 8 U.S.C. 1409(a)(1) | 7 |
| 8 U.S.C. 1409(a)(2) | 7 |
| 8 U.S.C. 1409(a)(3) | 7 |

Statutes—Continued: Page

8 U.S.C. 1409(a)(4) ..... 7
8 U.S.C. 1409(c) ..... 7
8 U.S.C. 1427 (1994 & Supp. V 1999) ..... 6
8 U.S.C. 1431 ..... 14
8 U.S.C. 1432 ..... 2, 12, 14
8 U.S.C. 1432(a) ..... 3, 4, 9, 10, 12, 14
8 U.S.C. 1432(a)(1) ..... 2, 4, 12
8 U.S.C. 1432(a)(2) ..... 2, 4
8 U.S.C. 1432(a)(3) ..... 2, 4, 5, 6, 9, 12, 13
8 U.S.C. 1432(a)(4) ..... 2
8 U.S.C. 1432(a)(5) ..... 2
8 U.S.C. 1433 ..... 6, 14

Miscellaneous:

National Conference of Comm'rs on Uniform State Laws, *Uniform Parentage Act* (2000) ..... 9

# In the Supreme Court of the United States

No. 00-895

KEVIN WEDDERBURN, PETITIONER

*v.*

IMMIGRATION AND NATURALIZATION SERVICE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-14a) is reported at 215 F.3d 795. The opinion of the Board of Immigration Appeals (Pet. App. 15a-20a) is unreported. The opinion of the immigration judge (Pet. App. 21a) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on June 1, 2000. A petition for rehearing was denied on August 31, 2000 (Pet. App. 1a). The petition for a writ of certiorari was filed on November 29, 2000. The

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

1. Article I of the Constitution assigns Congress the power "[t]o establish an uniform Rule of Naturalization." U.S. Const. Art. I, § 8. In the exercise of that power, Congress has afforded certain classes of persons United States citizenship by statute.

The statute at issue here, 8 U.S.C. 1432, provides that children who are born outside of the United States, and whose parents both were aliens, become citizens of the United States upon naturalization of their parents, if certain requirements are satisfied. Under that statute, the child acquires citizenship as a result of (1) the naturalization of both parents before the child's eighteenth birthday, and (2) the child's lawful residence in the United States while the child is under age 18. See 8 U.S.C. 1432(a)(1), (4) and (5). Under limited circumstances, however, the first requirement can be satisfied through the naturalization of only one parent. If one parent is deceased, naturalization of the surviving parent while the child is under age 18 satisfies the parental naturalization requirement. 8 U.S.C. 1432(a)(2). Likewise, if the child's parents are legally separated, naturalization of the parent having legal custody suffices. 8 U.S.C. 1432(a)(3). And, if the child was born out of wedlock and paternity has not been established by legitimation, naturalization of the mother before the child reaches age 18 meets the parental naturalization requirement. *Ibid.*

2. Petitioner was born in Jamaica on October 30, 1975. Both of his parents were citizens of Jamaica at the time of his birth. Although petitioner's parents never married, petitioner's father added his name to peti-

tioner's birth certificate in 1986, thereby legitimating petitioner under Jamaican law. That same year, petitioner's father moved to the United States and married a woman who later became a United States citizen. Pet. App. 3a.

In 1987, petitioner was admitted to the United States as a permanent resident alien based on the citizenship of his father's wife. Pet. App. 3a-4a, 17a. Three years later, petitioner went to live with his paternal grandmother. *Id.* at 4a. In 1993, when petitioner was 17 years old, his father became a naturalized United States citizen. *Id.* at 3a, 17a. Petitioner's mother has never acquired United States citizenship. *Id.* at 5a.

In 1995, petitioner was convicted of aggravated criminal sexual assault of a boy under nine years of age. He was sentenced to six years' imprisonment. Pet. App. 3a.

3. The Immigration and Naturalization Service (INS) initiated deportation proceedings against petitioner based on the sexual assault conviction. Pet. App. 17a-18a; see 8 U.S.C. 1227(a)(2)(A)(ii) and (iii) (Supp. V 1999) (formerly codified at 8 U.S.C. 1251(a)(2)(A)(ii) and (iii) (1994)). Petitioner contended that he was not subject to deportation, claiming United States citizenship under Section 1432(a) based on his father's naturalization. Pet. App. 17a. The immigration judge continued the deportation hearing to allow petitioner to make a formal application for United States citizenship. *Ibid.* Petitioner's application for citizenship was denied, *id.* at 27a-30a, and the immigration judge in the deportation case then ordered petitioner deported to Jamaica, *id.* at 21a.

The Board of Immigration Appeals (Board) affirmed. Pet. App. 15a-20a. It held that petitioner has no valid claim to citizenship under any of the provisions of

Section 1432(a) because only his father has been naturalized. The Board also rejected petitioner's argument that, to avoid alleged constitutional problems, Section 1432(a) should be construed to allow petitioner to secure citizenship. In particular, the Board rejected petitioner's reliance on *Miller* v. *Albright*, 523 U.S. 420 (1998), which involved a different citizenship provision (8 U.S.C. 1409) and which, in any event, rejected the equal protection challenge to that provision. The Board further noted that it lacked authority to rule on a constitutional challenge to Section 1432(a). Pet. App. 20a.

4. The court of appeals affirmed. Pet. App. 2a-14a. The court first held that petitioner is not a citizen under the plain language of Section 1432(a). *Id.* at 4a-5a. Petitioner is not a citizen under Section 1432(a)(1) or (2), the court explained, because his mother has not become a naturalized citizen of the United States, and she is still alive. See *id.* at 4a. The court further held that Section 1432(a)(3) does not apply to petitioner because his parents never married and thus are not legally separated, and because his paternity has been established by legitimation under Jamaican law. *Id.* at 4a-5a.

After rejecting several proposed constructions of Section 1432(a) that would have brought petitioner within its scope (see Pet. App. 5a-9a), but which petitioner does not re-argue here, the court of appeals addressed petitioner's constitutional challenges to Section 1432(a). As in the proceedings before the Board, petitioner relied primarily upon *Miller* v. *Albright*, in which this Court considered, but failed definitively to resolve, the question whether Section 1409(a)'s prerequisites for claiming citizenship at birth through an unmarried United States citizen father discriminate on the basis of gender in violation of the Fifth Amendment. The court of appeals rejected petitioner's argu-

ment that *Miller* establishes a constitutional defect in Section 1432(a)(3).

First, proceeding on the assumption that the relevant provisions in Section 1432(a)(3) draw a gender-based distinction analogous to the one at issue in *Miller*, the court of appeals concluded that the six Justices who rejected the equal protection challenge to Section 1409 in *Miller* would likewise reject the equal protection challenge to Section 1432(a)(3) made by petitioner in this case. Pet. App. 10a-12a. Indeed, the court of appeals concluded that even the three dissenters who would have found an equal protection violation in *Miller* might find that petitioner lacks standing to assert an equal protection challenge on behalf of his father in this case: whereas Miller's citizen-father had sought unsuccessfully to participate in that case, petitioner's father in this case made no effort to assert an equal protection claim on his own behalf, and, accordingly, petitioner could not assert the rights of his father. *Id.* at 12a.

The court of appeals next concluded that petitioner's reliance upon *Miller* was misplaced for the more fundamental reason that Section 1432(a)(3), unlike the law at issue in *Miller*, does not draw a sex-based distinction that affects petitioner. Pet. App. 13a. Because petitioner was legitimated under Jamaican law, the court held that there was no basis for petitioner to challenge Section 1432(a)(3)'s provision allowing children who have *not* been legitimated to obtain citizenship by virtue of their mother's (but not their father's) naturalization. The other provision in Section 1432(a)(3) allows a child to obtain citizenship based on the naturalization of the parent having legal custody of the child after a legal separation, and does not draw any gender-based distinction. *Ibid.* Accordingly, "a legiti-

mated child such as [petitioner] has no sex-discrimination claim at all." *Ibid.*

Finally, the court of appeals determined that when Congress provided a special avenue to citizenship for children of parents who were married but are legally separated—by granting citizenship upon naturalization of the parent having legal custody of the child—it was not constitutionally required to apply the same "custodial parent" rule to the situation of legitimated children whose parents never married. Pet. App. 14a. The court also noted that petitioner's father, once he became a citizen and assumed legal custody of petitioner, could have applied to have petitioner granted citizenship under 8 U.S.C. 1433, which furnishes an alternative avenue for conferral of citizenship on children born abroad who have a United States citizen parent. Petitioner, moreover, could have applied for citizenship on his own behalf under 8 U.S.C. 1427 (1994 & Supp. V 1999) after he became an adult permanent resident alien. Pet. App. 14a.

## ARGUMENT

This case dos not present the issue that is before the Court in *Nguyen* v. *INS*, No. 99-2071 (argued Jan. 9, 2001). *Nguyen*, like *Miller* v. *Albright*, 523 U.S. 420 (1998), involves an equal protection challenge to gender-based distinctions in a different provision of the Immigration and Nationality Act, 8 U.S.C. 1409. The provision at issue in this case, 8 U.S.C. 1432(a)(3), does not make any gender distinction with respect to children, such as petitioner, who either are born in wedlock, or are born out of wedlock but legitimated before their eighteenth birthday. The decision of the court of appeals sustaining Section 1432(a)(3) is correct, and it does not conflict with *Miller* or any other decision

of this Court, or with any decision of another court of appeals. Further review therefore is not warranted.

1. Contrary to petitioner's principal argument (Pet. 9-13), this case does not present the issue raised in *Miller* and *Nguyen*. Those cases involve the constitutionality of 8 U.S.C. 1409(a). Under Section 1409(a), a child born outside the United States to an unmarried father who is a United States citizen is a United States citizen at birth on the same terms as if the father had been married to the mother, if: there is clear and convincing evidence of a blood relationship between the child and the father, 8 U.S.C. 1409(a)(1); the father had United States nationality at the time of the child's birth, 8 U.S.C. 1409(a)(2)[1]; the father (if living) has agreed in writing to provide financial support for the child until the child is 18 years old, 8 U.S.C. 1409(a)(3); and, before the child turns 18, the child is legitimated under the law of his or her residence or domicile, the father acknowledges paternity of the child in writing under oath, or the paternity of the child is established by adjudication by a court of competent jurisdiction, 8 U.S.C. 1409(a)(4). Section 1409(c), by contrast, provides that a child born abroad out of wedlock to a United States citizen mother is a United States citizen if the mother was physically present in the United States, before the child's birth, for a continuous period of at least one year. 8 U.S.C. 1409(c).

In *Miller*, a woman who was born in the Philippines to a Filipino mother and American father, out of wedlock, challenged the denial of her application for regi-

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[1] The statutory distinction between "nationality" and "citizenship" "has little practical impact today" because there are few nationals of the United States who are not citizens. *Miller*, 523 U.S. at 467 n.2 (Ginsburg, J., dissenting).

stration as a United States citizen. See 523 U.S. at 424-426. Two Members of the Court concluded that the citizenship requirements of Section 1409(a) do not violate the equal protection rights of either the child or the citizen father. See *id.* at 429-445 (opinion of Stevens, J.). Those Justices noted that "[d]eference to the political branches dictates 'a narrow standard of review of decisions made by the Congress or the President in the area of immigration and naturalization,'" but held that the requirements of Section 1409(a) are, in any event, "substantially related to important governmental objectives." *Id.* at 434-435 n.11 (quoting *Matthews* v. *Diaz*, 426 U.S. 67, 82 (1976)). Two other Justices agreed that Section 1409(a) does not violate the child's equal protection rights. *Id.* at 451-452 (O'Connor, J., concurring in the judgment). Those concurring Justices declined to consider whether Section 1409(a) unconstitutionally discriminates against citizen fathers, because the petitioner's father had abandoned his equal protection claim and was not a party before the Court, and the child did not, in the view of those Justices, have third-party standing to raise the father's equal protection rights. *Id.* at 445-451. Two Justices declined to address the constitutional claim of either the father or the child, on the ground that the Court would lack power to confer citizenship as a remedy even if Section 1409 were held unconstitutional. *Id.* at 452-459 (Scalia, J., concurring in the judgment). Three Justices would have held that Section 1409 draws an unconstitutional distinction between unwed fathers and unwed mothers, and thus denies unwed citizen fathers equal protection. *Id.* at 460-471 (Ginsburg, J., dissenting); *id.* at 471-490 (Breyer, J., dissenting).

Unlike both *Miller* and *Nguyen* (which presents substantially the same question as *Miller*), this case

involves no distinction based on the gender of the parent. As the court of appeals explained (Pet. App. 13a), the only provision in Section 1432(a) that distinguishes between a citizen mother and a citizen father is the portion of Section 1432(a)(3) that applies to children who were born out of wedlock and who have not been legitimated by means authorized under applicable law (such as marriage of the father to the mother, formal acknowledgment by the father, or an adjudication of paternity). Such a child lacks a legally recognized parent-child relationship with the father—not just for purposes of the naturalization laws, as petitioner seems to believe (see Pet. 10-12, 15)—but typically in the domestic context as well. See, *e.g.*, National Conference of Comm'rs on Uniform State Laws, *Uniform Parentage Act* § 201 (2000) ("Establishment of Parent-Child Relationship"); cf. Pet. 17-18. It therefore is the mother's acquisition of United States citizenship before the child turns 18 that determines the child's eligibility for citizenship. That provision of Section 1432(a)(3) addressing the situation of children who have not been legitimated is inapplicable to petitioner, however, because petitioner was legitimated when he was 10 years old. See Pet. App. 3a. Petitioner would have been equally ineligible for citizenship under that provision if it had been his mother, rather than his father, who was naturalized when petitioner was under 18.

*Miller* and *Nguyen* also are distinguishable because they involve a claim to citizenship at birth. See Pet. App. 12a. Justice Breyer, writing for all the Justices who would have found an equal protection violation in *Miller*, was of the view that the "unusually lenient constitutional standard of review" that applies in the immigration and naturalization contexts under cases such as *Fiallo* v. *Bell*, 430 U.S. 787, 792-796 (1977),

should govern only when challenge is made to statutes "that confer citizenship on those who originally owed loyalty to a different nation." 523 U.S. at 481 (Breyer, J., dissenting). Petitioner in this case was born a Jamaican citizen and claims that he became a United States citizen as a teenager, as a derivative consequence of his father's naturalization. See Pet. 4, 6. Even under the view of the dissenting Justices in *Miller*, therefore, an equal protection challenge to any gender-based distinction in Section 1432(a) should be rejected if there is "a facially legitimate and bona fide reason" for Congress's policy choice. *Fiallo*, 430 U.S. at 794. Nothing in any of the opinions in *Miller* suggests that, where the father has not legitimated the child, allowing the child to rely solely upon the mother's citizenship would fail that highly deferential test.

Finally, even if the litigation under Section 1409(a) were relevant to this case—which it is not—there still would be no basis for holding this case pending the Court's decision in *Nguyen*. The petitioner in this case is the child seeking citizenship. Unlike *Nguyen*, the United States citizen father is not asserting his own rights. Cf. Pet. Br. at 24, *Nguyen*, No. 99-2071 (father in *Nguyen* asserts his right "to be free of discrimination in transmitting statutory 'citizenship at birth.'"). And, unlike *Miller*, the citizen father "did not attempt to join in his son's appeal." Pet. 12 n.3. Five Justices suggested in *Miller* that in circumstances such as those presented in this case, where it appears that petitioner's citizen father has never made any effort to assert a claim to United States citizenship on behalf of his son, the child would lack third-party standing to assert the rights of his father. See Pet. App. 12a; *Miller*, 523 U.S. at 447-451 (O'Connor, J., concurring in the judgment) (child may not assert equal protection

claim on behalf of citizen father where father failed to appeal dismissal of his claim); *id.* at 473-474 (Breyer, J., dissenting) (dismissal of father from case on motion of government afforded child third-party standing to assert father's rights).[2]

Two additional Justices concluded in *Miller* that a party in petitioner's position would not be entitled to citizenship even if he were to prevail on the merits, see 523 U.S. at 452-459 (Scalia, J., concurring in the judgment), bringing to seven the number of Justices who apparently would have rejected petitioner's claim in this case without regard to the merits of a gender-based equal protection argument.[3] Thus, if *Miller* were relevant here, the relevance would be that petitioner's arguments are foreclosed without regard to the Court's

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[2] Petitioner asserts (Pet. 12-13 & n.3) that his father might have thought it futile to attempt to intervene in this case. As petitioner himself acknowledges, however, the father in *Nguyen* did successfully intervene in his son's case. See Pet. 12 n.3. More importantly, it was clear after *Miller*, and therefore by the time of the Board and court of appeals proceedings in this case, that an attempt to intervene, even if unsuccessful, might have enabled petitioner to assert an equal protection claim on behalf of his father. See *Miller*, 523 U.S. at 474 (Breyer, J., dissenting) ("The Government's successful dismissal motion thus had practical consequences that 'hindered' [the father's assertion of his claim] at least as much as those we have elsewhere said create 'hindrances' sufficient to satisfy this portion of the 'third-party standing' test."). In that regard, we note that petitioner was represented by counsel before the Board (see Pet. App. 16a) and before the court of appeals (see *id.* at 2a).

[3] Justice Stevens and Justice O'Connor noted the remedial issue discussed in Justice Scalia's opinion but did not address it in light of their concurrence in the disposition on other grounds. See 523 U.S. at 445 n.26 (opinion of Stevens, J.); *id.* at 451 (O'Connor, J., concurring in the judgment).

consideration of the gender-discrimination claim in *Nguyen*.

2. Petitioner's other challenge to Section 1432 concerns what he terms Section 1432(a)(3)'s "legitimacy-related distinctions." Pet. 14. As an initial matter, petitioner errs in relying (Pet. 16, 17) on *Trimble* v. *Gordon*, 430 U.S. 762, 767 (1977), and its progeny for the proposition that any distinctions drawn in Section 1432(a) based on legitimacy would be subject to heightened scrutiny. On the same day on which the Court decided *Trimble* v. *Gordon*, it held in *Fiallo*, 430 U.S. at 792-795, that in the immigration and naturalization context, distinctions based on the legitimacy of a child are subject only to the scrutiny provided for under *Kleindienst* v. *Mandel*, 408 U.S. 753, 770 (1972): whether the challenged classification is based on a "facially legitimate and bona fide reason."

In any event, the relevant statutory provision in this case does not draw a distinction based on legitimacy. Petitioner's basic argument is that Section 1432(a)(3) is under-inclusive because it allows only a child whose parents were married but are legally separated to acquire citizenship if the parent who has legal custody of the child is naturalized, and that Congress additionally should have waived the default rule of Section 1432(a)(1) (*i.e.*, that *both* parents must be naturalized[4]) for legitimated children whose parents were never married in the first place. See Pet. 15, 17. The relevant

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[4] As the court of appeals pointed out (Pet. App. 10a), both the child and a parent who is not a United States citizen may have reasons to prefer the child's original citizenship to United States citizenship, and Congress could reasonably decide not to confer United States citizenship automatically upon the naturalization of just one of two parents where there are two legally recognized parents.

statutory distinction for purposes of that argument, however, is not between legitimate and illegitimate children, but rather between legitimate children whose parents never married, and legitimate children whose parents did marry but are legally separated. Such a distinction implicates no suspect classification. Even in the context of a purely domestic statute, it would trigger only rational basis review. See Pet. App. 9a. Here, the more deferential standard of review described in *Fiallo* v. *Bell* and *Kleindienst* v. *Mandel* applies.[5]

As the court of appeals held, Congress can at most be charged with failing expressly to address "a small

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[5] Congress distinguished between illegitimate and legitimate children only insofar as it allowed children who have two living parents, but who have not been legitimated by their father, to become citizens after the naturalization of their mother. 8 U.S.C. 1432(a)(3). That provision directly serves Congress's purpose of allowing children to gain citizenship after the naturalization of one parent in specified, recurring situations (death, legal separation, and illegitimacy) when only that United States citizen parent has an ongoing legal relationship with the child. Congress reasonably determined that the situation presented here—a child who has a legal relationship with *both* his father and his mother, but only one of those parents is a United States citizen—does not fall within that category. See note 4, *supra*.

In any event, the constitutionality of that provision is immaterial here. If the Court were to sustain petitioner's equal protection challenge, it would either remove the challenged disparity or extend it to the disfavored class of legitimate children. See generally *Heckler* v. *Mathews*, 465 U.S. 728, 738 (1984). If the Court removed the provision that assists children who have not been legitimated, petitioner would not be affected because he is a legitimate child. On the other hand, if the Court extended that special provision to legitimate children, petitioner would not acquire citizenship because his mother has never been a naturalized United States citizen.

subset" of cases involving children of parents who (1) might be thought, as a practical matter, to be similarly situated to formerly married parents who are legally separated, but (2) are unable to obtain a legal declaration of that assertedly similar status because they were never married to begin with. Pet. App. 10a. Regardless of whether this case is within that "small subset," Congress's failure to address such extraordinary situations does not render the statutory scheme of Section 1432(a) irrational. See *id.* at 9a-10a, 14a.

3. Finally, petitioner notes (Pet. 19-20) that Section 1432 will be repealed as of February 27, 2001, in favor of new provisions to be codified at 8 U.S.C. 1431 and 1433. See Child Citizenship Act of 2000, Pub. L. No. 106-395, §§ 101, 102, 114 Stat. 1631-1633. Far from supporting petitioner's request for review by this Court, that repeal lessens the prospective significance of petitioner's constitutional challenge and further confirms that certiorari is not warranted.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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# In The

# SUPREME COURT of the UNITED STATES

KEVIN WEDDERBURN,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

On Petition For a Writ of Certiorari to The United States Court of Appeals for the Seventh Circuit

## PETITIONER'S REPLY BRIEF

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12 pp

**TABLE OF CONTENTS**


***Page***

INTRODUCTION ..... 1

I. This Case Presents Important Issues of Gender Discrimination Very Similar To The Gender Discrimination Claim Pending Before This Court in *Nguyen v. INS*. ..... 2

II. This Case Presents Important Issues of Legitimacy Discrimination Very Similar To The Gender Discrimination Claim Pending Before This Court in *Nguyen v. INS*. ..... 7

CONCLUSION ..... 9

## TABLE OF AUTHORITIES


*Page*

**Cases**

*Fiallo v. Bell*, 430 U.S. 787 (1977) ..... 4, 5, 7

*Lake v. Reno*, 226 F.3d 141 (2nd Cir.), *cert. filed*, 69 U.S.L.W. 3418, No. 00-963 (Dec. 11, 2000) ..... 4-5

*Miller v. Albright*, 523 U.S. 420 (1998) ..... 4, 5, 6

*Nguyen v. INS*, 208 F.3d 528 (5th Cir.), *cert. granted*, 69 U.S.L.W. 3191 (Sept. 26, 2000) ..... passim

*Trimble v. Gordon*, 430 U.S. 762 (1977) ..... 6, 7, 8

**Statutes**

8 U.S.C. § 1409 ..... 3, 4, 5, 7

8 U.S.C. § 1431 ..... 3, 8

8 U.S.C. § 1432 (repealed) ..... passim

**Miscellaneous**

Kurzban, Ira J., *Kurzban's Immigration Law Sourcebook*, 6th Ed. (1998) ..... 3

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# PETITIONER'S REPLY BRIEF

## INTRODUCTION

Respondent states that Congress's overarching purpose in enacting 8 U.S.C. § 1432 was to preserve family unity and avoid hardship.[1] Respondent further admits that, in enacting § 1432, Congress intended to permit single-parent transmission of citizenship when the naturalizing parent is the only parent who has an ongoing legal relationship with the child. Kevin

[1] Respondent identified this statutory purpose on pages 25-26 of its response to Kevin Wedderburn's opening brief in the Seventh Circuit.

Wedderburn fits squarely within this profile. Kevin's mother abandoned him at birth, and explicitly relinquished custody to Kevin's father when Kevin was seven years old. App. 31a. Kevin's father formalized his parental ties to Kevin by legitimating Kevin under Jamaican law, and worked for five years to bring Kevin to this country to live with him. He maintained legal custody of Kevin until Kevin became an adult, and naturalized before Kevin turned 18. These facts are undisputed, and Respondent's failure to acknowledge them should not be allowed to obscure how well they correspond to Congress's purpose.

The question is whether the distinctions drawn in § 1432(a)(3), which condition a child's ability to gain citizenship through his citizen parent on the gender of the parent, the parent's marital status, and the legitimacy of the child, are appropriately related to the statute's purpose. This question, and that of the proper level of scrutiny to be applied to such distinctions, will be largely resolved by this Court's decision in *Nguyen v. INS*, 208 F.3d 528 (5th Cir.), *cert. granted*, 69 U.S.L.W. 3191 (Sept. 26, 2000), now pending before the Court. The Court should grant the petition for certiorari and hold this case for remand for further proceedings consistent with its decision in *Nguyen*.

## I. This Case Presents Important Issues of Gender Discrimination Very Similar To The Gender Discrimination Claim Pending Before This Court In *Nguyen v. INS*.

Respondent argues that this case presents no gender discrimination claim because Kevin Wedderburn is legitimated, and the statute precludes both unwed mothers and unwed fathers from single-handedly conferring citizenship on their legitimated children. But this argument ignores the statute's total exclusion of unwed fathers from its provisions: no unwed father, whether he has legitimated his child or not, can ever

single-handedly pass citizenship to his child. Even § 1409, the provision of the Immigration and Nationality Act ("INA") challenged in *Nguyen v. INS*, is not so restrictive. That statute imposes extra requirements on an unwed father, arguably so that he can demonstrate a tie to his child akin to the tie the law ascribes to the unwed mother of an illegitimate child. By comparison, § 1432 provides no route, however burdensome, by which an unwed father can put himself in a position comparable to an unwed mother's. Respondent has offered no explanation for treating unwed fathers so differently, depending on whether they are native-born or naturalized citizens. Congress's intention to treat parents the same in their ability to pass citizenship to foreign-born children, regardless of whether the parent is native-born or naturalized, is evident in the Child Citizenship Act of 2000, which explicitly treats the two groups identically. *See* Pub. L. 106-395; 114 Stat. 1631, to be codified at 8 U.S.C. § 1431(a).

An unwed father must legitimate his child in order to establish a legal parent-child relationship – the same legal status that an unwed mother establishes by giving birth to a child. Moreover, to bring Kevin into this country, Fitzroy Wedderburn had to show both that he was Kevin's father and that he was married to Kevin's step-mother Velma.[2] Respondent argues that this necessary -- and socially desirable – process of legitimation is actually a trap for the unwary, because legitimation strips an unwed father of any ability to claim that
§ 1432 treats him differently from an unwed mother.

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[2] Velma became a citizen seven years before Fitzroy did. Having her, rather than Fitzroy, file the petition for Kevin avoided an extensive backlog in the preference system. *See* Kurzban, Ira J., *Kurzban's Immigration Law Sourcebook*, 6th Ed. (1998), at 515.

The plurality in *Miller*, however, is to the contrary. There, Justice Stevens, joined by Chief Justice Rehnquist, held that unwed mothers of illegitimate children and unwed fathers who have legitimated their children are similarly situated in practical as well as legal terms. *Miller v. Albright*, 523 U.S. 420, 444 (1998). Under this Court's prior reasoning, Fitzroy Wedderburn rendered himself similar, not dissimilar, to the class of mothers of illegitimate children who are favored by § 1432(a)(3), when he legitimated Kevin.

Respondent attempts to convince this Court that the gender discrimination inherent in § 1432 does not matter for three reasons: (1) § 1432 deals with citizenship transmitted by naturalized parents to their minor children, while § 1409 deals with citizenship transmitted by native-born parents to their children at birth; (2) any distinctions drawn in § 1432 are subject only to minimal scrutiny under *Fiallo v. Bell*, 430 U.S. 787, 794 (1977); and (3) Kevin has no standing to raise a gender-discrimination claim. Respondent is wrong on all three counts.

First, § 1432 and § 1409 are both automatic citizenship provisions, though they are triggered by different events. In either case, parents can transmit citizenship to their children as soon as they themselves possess it. In either case, the child acquires full citizenship; children of naturalized citizens do not acquire a different, or inferior, form of citizenship compared to children of native-born citizens. Nor is there any meaningful distinction in terms of where the child's "loyalties" lay before the citizenship was made. In fact, people claiming citizenship under § 1409 often do so long after birth: Ms. Miller was 22 years old when she claimed citizenship; Mr. Nguyen was 27; and Mr. Lake, respondent in the government's recently filed petition for certiorari, *Lake v. Reno*, 226 F.3d 141 (2nd Cir), *cert. filed*, 69 U.S.L.W. 3418, No. 00-963 (Dec. 11, 2000), was 45.

Second, while Congress may have broad latitude to establish the conditions under which immigrants may enter or

remain in the country under *Fiallo*, there is no reason to think it has comparable latitude to treat the children of citizens differently, depending on whether their parents acquired citizenship by birth or by naturalization. The government misinterprets Justice Breyer's language in his *Miller* dissent: for Justice Breyer, broad Congressional discretion under *Fiallo* applies to immigration rules, and standard equal protection doctrines apply to citizenship provisions such as the one under review in *Miller*. Justice Breyer says nothing to support Respondent's view that *Fiallo* draws a line through the middle of this country's automatic citizenship rules. Section 1432 and § 1409 should be reviewed for constitutionality under a single standard, and this Court's decision in *Nguyen* will clarify what that standard is.

Finally, Respondent is also mistaken in thinking that Kevin's standing to raise a gender discrimination claim distinguishes this case from *Nguyen* and *Miller*. The *Miller* decision was fragmented on this issue, but at least two Justices assumed that the gender discrimination claim was properly before the Court no matter what Lorelyn Miller's father had done or failed to do. 523 U.S. at 433. Three more thought that Mr. Miller's attempt to recognize his daughter after she reached adulthood was enough to allow her to pursue his gender discrimination claim. 523 U.S. at 473. Here, Fitzroy Wedderburn took steps to legitimate Kevin when Kevin was a child, and worked for years thereafter to bring him to the United States. Fitzroy Wedderburn took the necessary legal steps for his son when, under the provisions of the Immigration and Nationality Act, it mattered.

Not only was Fitzroy more conscientious in acknowledging his child than Mr. Miller was, but Kevin's case, unlike *Miller*, is a deportation proceeding in which the INS's jurisdiction over him depends on whether he is or is not a citizen. The fact that Fitzroy did not file a separate lawsuit after the INS commenced proceedings against Kevin should not

preclude consideration of the gender discrimination inherent in § 1432.[3]

Because the decision in *Nguyen* will largely dictate the outcome of the gender discrimination claim in this case, and because this Court's prior decisions support Kevin Wedderburn's standing to bring this claim, certiorari is appropriate.[4]

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[3] Nor should it matter that Fitzroy was not made a party in Kevin's deportation case, as Mr. Nguyen's father apparently was. 208 F.3d at 534. In fact, we do not understand how the Court of Appeals could treat Mr. Nguyen's father as a party, since the INS has no jurisdiction over citizens, and no precedent supports permitting family members to raise their own claims in a deportation case.

[4] Respondent also continues to assert that Kevin Wedderburn could have sought citizenship under other discretionary provisions of the Immigration Act. While this may be so, the same is true for Mr. Nguyen. The availability of alternate routes to citizenship is irrelevant to whether § 1432 violates the Constitution. *See Trimble v. Gordon*, 430 U.S. 762, 774 (1977).

II. This Case Presents Important Issues of Legitimacy Discrimination Very Similar To The Gender Discrimination Claim Pending Before This Court In *Nguyen v. INS*.

Respondent attempts to dismiss Kevin Wedderburn's claim that § 1432 discriminates on the basis of legitimacy on three grounds, none of which is correct.[5] First, Respondent claims that under *Fiallo v. Bell*, 430 U.S. 787 (1977), which was decided the same day as *Trimble v. Gordon*, 430 U.S. 762 (1977), legitimacy-based distinctions in immigration statutes are entitled only to deferential review. But, as discussed above, the differential treatment in *Fiallo* rested on the leeway given to Congress in matters such as the immigration preference at issue in that case, not on any notion that Congress can treat native-born and naturalized citizens differently, or grant or withhold citizenship based on a child's legitimacy. If the *Fiallo* standard of review does not insulate the gender distinctions in § 1409 -- as a majority of the Court in *Miller* apparently believed, and the Court in *Nguyen* will decide -- it does not insulate the legitimacy-based distinctions in § 1432(a)(3) either.

Respondent's second argument is that § 1432(a)(3) does not draw distinctions based on legitimacy, but this argument is contradicted both by the court below, App. 14a, and by the language of the statute, which provides that illegitimate children may gain automatic citizenship through one unwed parent (the mother), but legitimate children may not. Moreover, Respondent acknowledges that the statute makes it impossible for legitimate children with two living parents to derive citizenship from one parent unless their parents were married and are "legally separated." Respondent says this requirement

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[5] Kevin's standing to raise his legitimacy discrimination claim has not been challenged.

does not trigger any heightened scrutiny,[6] but in *Trimble* this Court held just the opposite when it struck down a statute granting benefits only to the children of married parents. This Court's long-standing rejection of distinctions that penalize children because their parents never married is all the more appropriate in light of the sweeping trend toward legal acceptance of legitimation without marriage.[7]

Finally, Respondent suggests that there is no way to remedy the statute's legitimacy-based distinctions to provide a remedy to Kevin, but this is simply untrue, as discussed in greater detail in the Petition for a Writ of Certiorari. Pet'n at 18-20. The recent amendments to § 1432 support the excision of the discriminatory provisions in a manner that would grant Kevin Wedderburn citizenship through his father. *See*, 8 U.S.C. § 1431(2001).

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[6] As discussed in the Petition for a Writ of Certiorari ("Pet'n") at 14-16, the court below failed to apply any level of scrutiny to § 1432(a)(3)'s distinctions based on legitimacy and the parents' marital status. There is thus no basis for Respondent's assertion that the court "determined" that Congress was not constitutionally required to allow an unmarried custodial parent to pass citizenship to a child under the same conditions as a "legally separated" (i.e., divorced) custodial parent. Respondent's citation to page 14a of the Appendix is misleading; neither this page nor any other supports that proposition.

[7] Over 30 countries around the world now provide for legitimation of children without the parents' marriage. *See* Pet'n at 17, n.5. There is no support in the record for the hypothesis of the court below (and Respondent here) that children legitimated without their parents' marriage constitute only a "small subset" of the families covered by the INA.

## CONCLUSION

For the reasons set forth herein and in the Petition for a Writ of Certiorari, the Court should grant the Petition and hold the case for remand in light of the Court's decision in *Nguyen*.

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